Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JOHN A. GAMBONE, SR. and ANTHONY GAMBONE,
Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the wording of Internal Revenue Code § 7204 which provides that the misdemeanor offense of willfully furnishing a false W-2 to an employee shall be "[i]n lieu of any other penalty provided by law," precludes the conviction of other tax crimes based in part upon the consideration and/or existence of the misconduct set forth in § 7204.

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PETITION FOR A WRIT OF CERTIORARI

John A. Gambone, Sr. and Anthony Gambone respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 314 F.3d 163. The opinion of the district court (App., *infra*, 41a-91a) is reported at 180 F.Supp.2d 660.

JURISDICTION

The court of appeals entered its judgment on January 3, 2003 (App., *infra*, 40a), and denied the Gambones' petition for rehearing on February 10, 2003 (App., *infra*, 92a-93a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 7204: **Fraudulent statement or failure to make statement to employees**

In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a [Form W-2] statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in

the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

STATEMENT

Petitioners, John A. Gambone, Sr. and Anthony Gambone, were convicted and sentenced upon a multi-count indictment accusing them and others of conspiracy to defraud the United States and substantive tax offenses in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7206(2). App., *infra*, 3a-7a.

The core of the multi-count indictment against petitioners and the basis upon which their sentencing guidelines were calculated was the substantive charge that they "aided and assisted" in the preparation of false employee income tax returns in violation of 26 U.S.C. § 7206(2) and the conspiracy charge that they agreed to do so by furnishing false W-2 forms for attachment to their employees' personal income tax returns – reporting their regular wages, but failing to report overtime wages, expense reimbursements and off-payroll wages. *Id.* at 4a-5a. There was abundant government evidence of a scheme to provide such false W-2s, but there was no charge that petitioners had violated 26 U.S.C. § 7204 which sets forth as a misdemeanor offense the willful furnishing of a false W-2 to an employee and provides specifically that the punishment there set out shall be "[i]n lieu of any other penalty provided by law."

Petitioners owned and operated a business which constructed residential and commercial real estate. There was repetitive government evidence that petitioners would only pay straight time for overtime rather than the required time and one-half, that these overtime payments were not included in the employees' payroll checks, that they were paid instead by separate check with no amounts withheld for federal and state income taxes and for withholding under the Federal Insurance Contributions Act (FICA), and that the payment of wages represented by these separate checks was omitted from the W-2 forms provided to the employees and filed with the Internal Revenue Service. C.A. App. A272-A286, A557, A657-A662, A699-A709, A1085, A1731-A1732, A2332-A2333. Similarly paid and not reported were some wages paid as expenses, and some wages which were simply off-payroll. C.A. App. A293, A298-A299, A575-A580, A714-A715, A748, A840, A1912-A1913. All payments were by check and were recorded on the company's books. C.A. App. A375, A393.

While a number of employees testified that they understood they need not report the wages which were omitted from their W-2 (C.A. App. A441-A442, A557-A559, A711, A767, A1496), other employees testified that they thought the omission meant they were now responsible for reporting the additional wages (C.A. App. A2251, A2348-A2349). There was, however, no evidence that petitioners ever gave any indication that their employees need not or should not report all of their income, or that petitioners said or did anything at all with respect to their employees' income tax returns – *other than the furnishing of false W-2s*.

Petitioners were not indicted under 26 U.S.C. § 7204 which provides the exclusive remedy for willfully providing a false or fraudulent W-2 to an employee. Accordingly, the trial judge charged the jury that they had to find petitioners did "something else" to aid and assist their employees to file false personal tax returns "besides simply and only providing an incorrect W-2 form." C.A. App. A3256. While the court nowhere instructed the jury that the "something else" had to be enough standing alone to warrant a guilty verdict, even the need for the amorphous and unexplained "something else" was quickly eliminated by the contradictory instruction that a willfully false W-2 was "as a matter of law" sufficient without more. C.A. App. A3257.

The Preclusive Effect of Section 7204

Ordinarily, one who deliberately creates false or fraudulent tax documents for use in preparing another's tax return can properly be convicted under section 7206(2), and many cases have so held. *See, e.g., United States v. Lefkowitz*, 125 F.3d 608 (8th Cir. 1997); *United States v. Coveney*, 995 F.2d 578 (5th Cir. 1993); *United States v. Nealy*, 729 F.2d 961, 962-63 (4th Cir. 1984); *United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978); and *United States v. McCrane*, 527 F.2d 906, 912 (3d Cir. 1975), *vacated and remanded on other grounds*, 427 U.S. 909 (1976). Typically, the documents created are intended as support for a taxpayer's deductions, documents faking charitable donations, false business expense invoices and fraudulent tax shelters, but they may just as well work on the other side of the ledger and provide false documentation as to income earned. *A false or fraudulent W-2 would be just such a document.* As the legislative history makes

plain, however, it is precisely because Congress wanted to prevent such a W-2 from being the vehicle whereby tax misdemeanor penalties were raised to the more severe level of tax felony punishment that Congress made section 7204 the exclusive sanction for willfully furnishing a false or fraudulent W-2.

Because section 7204 expressly provides that its punishment is "[i]n lieu of any other penalty provided by law," petitioners maintained below that a violation of section 7204 may not be prosecuted under any other section. That was the very ruling in *United States v. Hughes*, 899 F.2d 1495 (6th Cir. 1990), where the Sixth Circuit squarely held that section 7204 provided the exclusive sanction against an employer for willful submission of a false or fraudulent W-2, precluding a section 7206(2) felony conviction.

The History of Section 7204

The legislative history is as unambiguous as the language of the statute. Section 7204 was originally enacted as section 470(a) of a new subchapter D and inserted at the end of Chapter 1 of the Internal Revenue Code of 1939, 56 Stat. 798, 884, 892. The legislative history explicitly states that Congress designed the "in lieu of" language now in section 7204 to "displace" the more severe penalties imposed by section 145 of the Code, precluding both other tax misdemeanors (section 145(a) *and* other tax felonies section 145(b)). Indeed, the Committee Reports of both houses of Congress confirm that with respect to such penalties as are now provided in section 7204: "These penalties are prescribed in lieu of the penalty imposed by § *145* of the Code, and are *much less severe than those displaced.*" (Emphasis supplied.) H.R. Rep. No.

2333, 77th Cong., 2d Sess. at 132 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. at 172 (1942). The specific Congressional intent to "displace" tax felonies (section 145(b)) as well as tax misdemeanors (section 145(a)) is further evidenced by the failed House proposal made at the same time to penalize fraudulent withholding exemption certificates, but only "in lieu of those [penalties] provided in section *145(a)* of the Code." (Emphasis supplied.) H.R. Rep. 2333, 77th Cong., 2d Sess. at 132 (1942). Over time section 470(a) was renumbered and moved about some, emerging finally in the 1954 recodification of the Code grouped with all the other tax crimes, 26 U.S.C. §§ 7201-7217, as § 7204. Throughout, its language never changed, nor did the original goal of Congress to have it "displace" any other applicable tax crime.

When assessing the reach of a federal criminal statute, close heed must be had to its language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress requires just that. *Dowling v. United States*, 473 U.S. 207, 213 (1985).

In 1981, the Eighth Circuit interpreted the language of 26 U.S.C. § 7205, another section providing that its penalty also was to be "in lieu of any other penalty provided by law . . . ," to mean that section 7205 was the exclusive sanction for the conduct there described (fraudulent W-4s). *United States v. Williams*, 644 F.2d 696 (8th Cir. 1981). Congress reacted promptly, amending the wording of section 7205 so as to eliminate the "in lieu of" language and to provide specifically that the penalty for violation of section 7205 shall be "in addition to any other penalty provided by law." 26 U.S.C. § 7205 (Supp. II 1984).

Section 7204, however, has fared differently. After the *Hughes* decision in 1990 held that the "in lieu of" language of section 7204 precluded elevating the misdemeanor conduct there described to a section 7206(2) tax felony, there was no similar Congressional reaction. From then to now, Congress has evinced no interest in changing the wording of section 7204 so that the holding in *Hughes* would no longer be applicable.

Petitioners' Contention

While petitioners maintained below that section 7204 provided the exclusive sanction against an employer for willful submission of a false or fraudulent W-2, precluding the use of such misconduct to support a section 7206(2) felony conviction, they did not contend that by furnishing false W-2s they thereby insulated themselves from a section 7206(2) conviction on some other basis. They maintained only that any such conviction had to be based upon independent, stand-alone evidence – evidence sufficient by itself without consideration of the false W-2 misconduct. Allowing a jury to consider the false W-2 misconduct along with other evidence – independently sufficient or not – in coming to a section 7206(2) conviction would expose the section 7204 misconduct to punishment as a felony in the face of a Congressional mandate to the contrary.

While proof of actual advice or counseling to file falsely, considered alone, would have been sufficient here, there was no such proof. Petitioners never told their workers to file falsely, never authorized anyone to carry that message, expressed no interest in the contents of their employees' tax returns, and took no affirmative

action with respect to those tax returns other than to furnish employees with false W-2s, reliance upon which was precluded by the section 7204 "in lieu of" language. Indeed, if the W-2s had not been false, none of the circumstantial evidence noted by the Third Circuit would have supported any kind of tax conviction.

Petitioners argued also that conduct ancillary to furnishing false W-2s, such as the deceptive company bookkeeping here and the off-payroll payments, could not constitute evidence independent of the false W-2s and could not act as such support for a section 7206(2) conviction. This is necessarily so because: (1) section 7204 requires proof of willfulness so that there will always be additional evidence establishing that petitioners did not act through negligence, or mistake, but rather because they intended to violate a known legal duty, and (2) every fraudulently understated W-2 is sure to involve money paid off-payroll in some fashion, so that allowing the bookkeeping or the payment process, or the form of such payment, to lift the preclusive effect of section 7204 would work a complete nullification of the "in lieu of" clause and Congress' explicit intent. False W-2s simply do not occur in a vacuum.

The Court of Appeals' Decision

The Third Circuit noted that "this case presents an issue of first impression in this court as we have not interpreted explicitly the 'in lieu of' language of section 7204, and we have not had the occasion to discuss the relationship between sections 7204 and 7206(2)." App., *infra* 10a. Agreeing with the Sixth Circuit's *Hughes* decision, the court of appeals held that the legislative history and the obvious purport of the "in lieu of" language clearly

established that Congress intended "to ensure that the section 7204 penalties displaced the more severe penalties in other provisions of the Internal Revenue Code setting out both felonies and misdemeanors." *Id.* at 13a. The Third Circuit misapprehended, however, the full thrust of *Hughes*, concluding that *Hughes* "did not clarify whether section 7206(2) requires proof of actual counseling or whether something more than furnishing false W-2s but less than actual counseling would support a conviction." *Id.* at 12a. Continuing further the panel rejected petitioners' contention that other conduct by petitioners ancillary to furnishing the false W-2s was likewise insufficient on its own to sustain a section 7206(2) conviction "[b]ecause this position lacks any support in the applicable case law." *Id.* at 16a.

Indeed, the only "applicable case law," the *Hughes* decision, turned away the very same kind of ancillary evidence as support for the section 7206(2) conviction. The district court in *Hughes* detailed the "other evidence" leading up to the preparation of the false income tax returns:

> There was more than sufficient evidence presented at trial that Hughes knowingly and willfully caused false expense vouchers to be made out, which caused the [employer] to have false records, which in turn caused the [employer] to prepare false W-2, W-3 and LM-2 forms.
>
> . . .
>
> there was evidence that, and the jury could have found beyond a reasonable doubt that, Hughes violated § 7206(2) by counseling Griffith to understate her income, by counseling her to state as income only what appeared on a false W-2 . . .

United States v. Hughes, 1987 WL 33806, 5-6 (N.D. Ohio Nov. 13, 1987).

While the district court in *Hughes* recognized that "Congress intended section 7204 to replace any penalty otherwise provided by § 7206" (*Id.* at *4), it saw the evidence of counseling – and not the false expense vouchers and other false records – as showing other action violative of section 7206(2) beyond the false W-2s, and so upheld Hughes' conviction under section 7206(2). *Id.* at *5. It was the lack of evidence of counseling, however, that led the Sixth Circuit to disagree and reverse the district court:

> However, a fair reading of the evidence would not permit the jury to conclude that defendant took any action with respect to the filing of Griffith's tax return other than causing the [employer] to furnish her with a false W-2 form. Griffith expressly denied that defendant gave her any advice concerning the filing of her tax return.

United States v. Hughes, 899 F.2d 1495, 1501 (6th Cir. 1990).

Noteworthy here, of course, is the fact that neither of the *Hughes* decisions considered the ancillary conduct – the false expense vouchers and false record keeping – as anything which might be sufficient to support a section 7206(2) charge. As observed, the other misconduct in *Hughes* was of the very same type as that relied upon by the panel here, *but none of it was considered to be the requisite affirmative action needed "with respect to" the filing of the employee tax returns.*

Having misconstrued *Hughes* and finding further that "[o]ur cases have not been more helpful with respect to the issue here than that of the court of appeals in *Hughes*," the

Third Circuit went on to affirm the judgments of conviction holding that a jury could "consider the furnishing of false W-2s in deciding whether a defendant committed an offense under section 7206(2)" and that "such evidence plus any other evidence suggesting an intent to cause a false return to be filed form a proper evidentiary basis for such a conviction." App., *infra*, 15a.

As "some support" for this holding, the Third Circuit referenced the fact that when the "in lieu of" language was first introduced in the Internal Revenue Code, section 7206(2) was already in place in another Chapter of the Code in the form of I.R.C. § 3793(b). *Id.* at 14a. From this, the panel concluded that there is no indication "that Congress intended [the 'in lieu of' language of] section 470(a), now section 7204, to displace the penalty under section 3793(b)." *Id.* at 14a. *Hughes* expressly rejected that interpretation:

> The predecessor of § 7206(2) was § 3793(b) which, except for minor differences is identical to § 7206(2), and was contained in Chapter 38, entitled "Miscellaneous Provisions." Section 3793(b) was part of the 1939 Code, having been enacted in 1926. Thus, it can be fairly presumed that Congress intended § 3793(b) to be one of the penalties which § 1626(a) [a predecessor of § 7204] would be "in lieu of." *United States v. Hughes*, 1987 WL 33806, *2 (N.D. Ohio Nov. 13, 1987).

Any doubt at all about the validity of *Hughes*' presumption disappears now that section 7206(2) and section 7204 are together among the "hierarchy of tax offenses set forth in §§ 7201-7207." *United States v. Bishop*, 412 U.S. 346, 359 (1973). Only section 7204 contains the "in lieu of" language.

The panel also cited as "implicitly" (App., *infra*, 15a) supporting its holding *United States v. MacKenzie*, 777 F.2d 811 (2d Cir. 1985) and *United States v. Isaksson*, 744 F.2d 574 (7th Cir. 1984). In each of those cases, the sufficiency of section 7206(2) convictions was upheld on the basis of false W-2s and some strikingly similar additional evidence. But, in neither of those cases was the preclusive effect of section 7204 even raised, let alone considered. Absent awareness of section 7204's preclusive effect, the sufficiency of the evidence was a foregone conclusion for, no matter what the additional evidence, the willful furnishing of false W-2s for use in another's tax return was *alone* enough to support a section 7206(2) conviction. *Supra*, p. 4-5. Precisely because that is so, allowing the furnishing of false W-2s to be considered in reaching a section 7206(2) verdict is as much a violation of the section 7204 prohibition when there is "other evidence" as when there is none. Yet that is exactly what was permitted the jury here, and what has now been approved by the Third Circuit.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS – AND THE DISAGREEMENT BETWEEN SOME CIRCUITS AND CONGRESS – AS TO THE EFFECT OF THE CONGRESSIONAL MANDATE THAT A VIOLATION OF INTERNAL REVENUE CODE SECTION 7204 SHALL BE "[I]N LIEU OF ANY OTHER PENALTY PROVIDED BY LAW."

The Third Circuit and the Sixth Circuit are in clear and irreconcilable conflict as to the meaning of the Congressional mandate imposed by the "in lieu of"

language of section 7204. The Sixth Circuit concluded that a section 7206(2) conviction had to be based upon independent, stand alone evidence – evidence sufficient by itself without consideration of the false W-2 misconduct. The Third Circuit rejected that view and held instead that a jury could actually consider the furnishing of false W-2s in deciding whether a defendant committed an offense under section 7206(2) and that such evidence, plus any other evidence suggesting an intent to cause a false return to be filed, was sufficient to sustain a section 7206(2) conviction.

Review by this Court is necessary because the question presented here has not only divided the Third and Sixth Circuits, it has received no mention at all by at least two others, the Second (*United States v. MacKenzie*, 777 F.2d 811 (2d Cir. 1985)) and the Seventh (*United States v. Isaksson*, 744 F.2d 524 (7th Cir. 1984)) with the result that the prerogatives of Congress to define federal crimes have either been ignored or evaded.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

As noted above, were it not for the preclusive effect of section 7204's "in lieu of" language, the deliberate creation of false W-2s for use in preparing employees' tax returns would, without more, be sufficient to sustain a section 7206(2) conviction. The position adopted by the Third Circuit would work a complete nullification of the "in lieu of" clause and Congress' explicit intent.

Allowing a jury to consider the false W-2 misconduct along with other evidence – independently sufficient or not – in coming to a section 7206(2) conviction would expose the

section 7204 misconduct to punishment as a felony in the face of a Congressional mandate to the contrary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PRECEDENTIAL

Filed January 3, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-4424 and 01-4427

UNITED STATES OF AMERICA

v.

JOHN A. GAMBONE, SR.
a/k/a JACK

John A. Gambone, Sr.,
Appellant in No. 01-4424

UNITED STATES OF AMERICA

v.

ANTHONY GAMBONE
a/k/a TONY

Anthony Gambone,
Appellant in No. 01-4427

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. Nos. 00-00176-1 and 00-00176-2)
District Judge: Honorable John R. Padova

Argued October 17, 2002

Before: ROTH and GREENBERG, *Circuit Judges*, and WARD, *District Judge*[*]

(Filed: January 3, 2003)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

I. FACTUAL AND PROCEDURAL HISTORY

This matter comes on before this court on appeals from judgments of conviction and sentence entered in the district court on December 13, 2001. Defendants-appellants, John A. Gambone, Sr. ("Jack") and Anthony Gambone ("Tony"), are brothers who owned and operated a construction business, known since 1983 as Gambone Brothers Organization, Inc. ("Gambone Brothers"). The indictment accused them of engaging in a three-part scheme over the course of 20 years, the purpose of which was to file false personal income tax returns and to aid and assist certain of their employees and subcontractors in doing the same. Although there are other Gambone defendants in this case, we sometimes refer to Jack and Tony exclusively as the Gambones as they are the only appellants.

The first prong of the conspiracy, called the "cash-skimming" prong in the indictment, involved a systematic plan to receive payment from home purchasers for certain "extras" in cash, not to record those payments on Gambone Brothers' books, and to hide this additional income from

the IRS by buying United States savings bonds or simply by holding the cash in a safe or a nightstand.[1]

Prong two of the conspiracy, called the "overtime/expense reimbursement 'off-payroll' fraud" prong in the indictment, charged that the Gambones used three methods to avoid reporting to the IRS significant wages paid to their employees with the intention that the employees would do the same. The first and most common method was to pay the employees "straight time" rather than time and one-half for all work beyond 40 hours per week and to pay the employees with two separate checks, one for 40 hours paid from a payroll account and a second for overtime paid from a nonpayroll account.[2] The purpose of this scheme was to avoid the requirements of the Fair Labor Standards Act and to avoid paying the employer's share of Social Security and Medicare ("FICA") taxes by not reporting the overtime wages to the IRS and by not withholding income or FICA taxes. The indictment also alleged that the Gambones, either themselves or through their personnel employees, informed new employees that Gambone Brothers would not report overtime wages and encouraged those employees to do the same. The second method used to avoid reporting wages involved disguising certain employees' raises as expense reimbursements, which are not reported as income. The third method

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[1] We point out that even though it might seem strange that a person would buy United States savings bonds with unreported income, the Gambones did so as the income from such bonds need not be reported to the IRS until they are cashed or mature.

[2] At least at certain times Gambone Brothers used an outside payroll service to pay straight time wages.

involved paying some employees partially or completely "off-payroll," that is, paying them from nonpayroll, operating accounts rather than from payroll accounts.

To conceal all three types of payments the Gambones had their finance department prepare and file numerous fraudulent tax documents, including false W-2 forms to be attached to employees' personal income tax returns reporting regular wages but failing to report overtime wages, expense reimbursements, and off-payroll wages. The government estimated that the Gambones aided and assisted their employees in failing to report at least $4.5 million in overtime wages and hundreds of thousands of dollars in wages disguised as expense reimbursement and off-payroll payments.

The third prong of the conspiracy, called the "unreported subcontractor payments" prong in the indictment, charged that the Gambones failed to issue and file IRS forms 1099 for millions of dollars worth of services rendered by subcontractors. In doing so, the Gambones aided and assisted some subcontractors in failing to report substantial income.

A grand jury returned a 67-count indictment against the Gambones and their co-defendants, Sandra Lee Gambone ("Sandy"), William Murdock, John Gambone, Jr. ("Johnny"), and Robert Carl Meixner on April 6, 2000. In particular Count One charged all defendants with the conspiracy to defraud the United States as outlined above, in violation of 18 U.S.C. § 371. Murdock and Meixner were implicated, however, only in the second prong of the conspiracy. Count Two charged Jack and Sandy, who are married, with the substantive offense of subscribing to their own false 1994 tax return, in violation of 26 U.S.C.

§ 7206(1). Count Three against Tony, Count Four against Murdock, Count Five against Johnny, and Count Six against Meixner similarly charged each individual with subscribing to a false personal tax return for either the 1993 calendar year (Johnny, Murdock, and Meixner) or the 1994 calendar year (Tony). Counts Seven through Sixty-Seven charged Jack and Tony with aiding and assisting in the preparation of false individual income tax returns for 61 employees, in violation of 26 U.S.C. § 7206(2).

After the district court granted Sandy and Johnny a severance, the case was tried against the other four defendants.[3] At the trial each of the defendants moved for a judgment of acquittal on all counts against them pursuant to Fed.R.Crim.P. 29(a) but the district court reserved judgment on these motions pursuant to Fed.R.Crim.P. 29(b). On November 17, 2000, the jury returned guilty verdicts on all counts against the Gambones except for counts Forty-Three and Fifty-Seven. In addition, it found Murdock guilty on Counts One and Four and Meixner guilty on Counts One and Six. Thus, the jury found all defendants guilty on all counts except that it found the Gambones not guilty of aiding and assisting two of the 61 employees in preparing false individual returns.

Following the jury verdicts, each defendant renewed his motion for a judgment of acquittal and, in the alternative, moved for a new trial. On September 4, 2001, the district court granted Jack's motion for judgment of acquittal on

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[3] The district court denied the defendants' pretrial motion to dismiss count one of the indictment. *See United States v. Gambone*, 125 F.Supp.2d 128 (E.D. Pa. 2000).

Count Two, Tony's motion for judgment of acquittal on Count Three, Murdock's motion for judgment of acquittal on Count Four, and Meixner's Motion for Judgment of Acquittal on Count One.[4] The court denied all the defendants' motions on all other counts. *See United States v. Gambone,* 167 F. Supp. 2d 803 (E.D. Pa. 2001). All defendants except Meixner therefore were acquitted of the substantive offense of filing a false individual tax return in either 1993 or 1994 but the court did not disturb any of the convictions on the conspiracy count except Meixner's and did not disturb the Gambones' convictions on 59 counts of aiding and assisting in the preparation of false individual tax returns. Moreover, the court denied the defendants' motions for a new trial. The court subsequently sentenced the Gambones to custodial terms of 37 months on Count One and custodial terms of 36 months on all other counts, all terms to run concurrently, ordered them to pay fines of $75,000 and to pay the IRS $3,000,000. In addition, the court imposed terms of supervised release upon the Gambones' completion of their custodial terms and ordered them to pay certain costs of the prosecution. They then appealed.[5] We have jurisdiction under 28 U.S.C. § 1291.

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[4] Although the September 4 order accompanying the court's opinion mistakenly granted Murdock's motion as to Count Three, in which he was not charged, that error was corrected by order of September 6, 2001.

[5] According to the Gambones' brief, Murdock and Meixner did not appeal and, as of the time of the filing of the Gambones' brief on this appeal, the case against Sandy and Johnny had not been tried. The Gambones challenge only their convictions and not their sentences on this appeal.

II. DISCUSSION

A. Sufficiency of the Evidence

1. *Standard of Review*

We review the "sufficiency of the evidence . . . in a light most favorable to the Government following a jury verdict in its favor." *United States v. Antico,* 275 F.3d 245, 260 (3d Cir. 2001) (citing *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457 (1942)). "We must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision. . . . We do not weigh evidence or determine the credibility of witnesses in making this determination." *United States v. Beckett,* 208 F.3d 140, 151 (3d Cir. 2000) (citations omitted). In making our review we examine the totality of the evidence, both direct and circumstantial. *See Antico,* 275 F.3d at 260. We must credit all available inferences in favor of the government. *See United States v. Riddick,* 156 F.3d 505, 509 (3d Cir. 1998). Our review of the district court's interpretation of a statute is plenary. *See United States v. DeJulius,* 121 F.3d 891, 893 (3d Cir. 1997).

2. *Aiding and Assisting Convictions*

We first address the Gambones' convictions for aiding and assisting their employees in the preparation of false individual income tax returns in violation of I.R.C. § 7206(2). Section 7206(2) provides:

Any person who

. . .

(1) [w]illfully aids or assists in, or procures, counsels, or advises the preparation or

> presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . .
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The Gambones advance a two-part argument challenging their convictions under section 7206(2). The first step in their reasoning raises a purely legal question. Casting their conduct as, at most, a scheme to provide false W-2s, they argue that the Internal Revenue Code allowed the government to prosecute them only under I.R.C. § 7204. Section 7204 sets forth a misdemeanor offense for willful furnishing of a false W-2 to an employee as follows:

> In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 [governing an employer's obligation to issue, inter alia, W-2 forms to employees] to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

The Gambones argue that this provision's "in lieu of" language indicates that section 7204 provides the exclusive penalty for willfully furnishing a false W-2 to an employee. They further note that the three-year statute of limitations for prosecutions under section 7204 had expired by the time the government initiated its case under section 7206(2).

The Gambones then argue that inasmuch as the government may prosecute a defendant for the willful furnishing of a false W-2 to an employee only under section 7204, the evidence was insufficient to sustain a conviction under section 7206(2) as that section requires proof of conduct beyond the mere furnishing of false W-2s. They contend that they did not take affirmative action with respect to their employees' false tax returns beyond furnishing the false W-2s, and that the jury could not appropriately consider the furnishing of those W-2s or other conduct facilitating it, such as paying money off payroll and underreporting on employee time cards, in connection with the section 7206(2) charges. The Gambones argue that if we remove this evidence from the equation there will not be an evidentiary basis for their section 7206(2) convictions.

a. *Exclusivity of section 7204*

As the district court noted, this case presents an issue of first impression in this court as we have not interpreted explicitly the "in lieu of" language of section 7204, and we have not had the occasion to discuss the relationship between sections 7204 and 7206(2). *See Gambone,* 167 F.Supp.2d at 820. The district court, relying primarily on *United States v. Hughes,* Crim. A. No. CR 86-98, 1987 WL

33806 (N.D. Ohio Nov. 13, 1987), held that "conduct which involves, but is not exclusively limited to, the provision of false W-2s can be sufficient for a § 7206(2) violation. Thus, the mere fact that the provision of false W-2s was a part of the case does not mean that a § 7206(2) violation is not possible." *Gambone* 167 F. Supp. 2d at 820. The court thus rejected the Gambones' contention that it should disregard entirely the furnishing of the W-2s in assessing the sufficiency of the evidence supporting the section 7206(2) convictions. Nonetheless, when moving on to examine the sufficiency of the evidence, the court found that the evidence was sufficient to sustain the section 7206(2) verdicts "even excluding consideration of the W-2s themselves." *Id.* at 821.

In *Hughes*, the district court concluded that "the simple fact of providing, or helping to provide, an individual with a fraudulent W-2 is not punishable under § 7206(2) because of § 7204's 'in lieu of' provisions." *Hughes,* 1987 WL 33806, at *4. The court found, however, that "[a]s long as there are other actions violative of § 7206, the fact that the defendant may also have provided an individual with a false W-2 does not prevent a § 7206 conviction." *Id.* (citing *United States v. MacKenzie,* 777 F.2d 811 (2d Cir. 1985); *United States v. Isaksson,* 744 F.2d 574 (7th Cir. 1984); *United States v. Barnes,* 313 F.2d 325 (6th Cir. 1963)). Having so concluded, the court denied the defendant's motion for judgment of acquittal or for a new trial, finding that, "[b]ased on the evidence presented, the jury could have found beyond a reasonable doubt that [the defendant] additionally counseled [an employee] to understate her income on her income tax return, by reporting as income only that amount shown on the W-2 and not the additional income which she received as 'expenses.'" *Id.* In

other words, the defendant violated section 7206(2) by going beyond merely providing false W-2s and, in fact, counseling an employee to understate income.

The defendant appealed and the Court of Appeals for the Sixth Circuit reversed even though it did not find that the district court erred in its legal analysis. Rather, the court of appeals held that there was insufficient evidence that the defendant counseled the employee to understate her income, noting that the employee had denied receiving such advice. *Hughes v. United States*, 899 F.2d 1495, 1500-01 (6th Cir. 1990). The court of appeals did not clarify whether section 7206(2) requires proof of actual counseling or whether something more than furnishing false W-2s but less than actual counseling would support a conviction.[6]

Our cases have not been more helpful with respect to the issue here than that of the court of appeals in Hughes. In a case not involving furnishing of false W-2s, we held that "[t]o establish aiding and abetting the filing of a false tax return 'there must exist some affirmative participation which at least encourages the perpetrator.'" *United States v. Graham*, 758 F.2d 879, 885 (3d Cir. 1985) (quoting *United States v. Buttorff*, 572 F.2d 619, 623 (8th Cir. 1978) (internal quotation omitted)). In *Graham*, we held that there was sufficient evidence to affirm a defendant's conviction where the defendant, who was a member of a group that opposed taxation, set up a Swiss bank account for another member and advised him not to pay taxes on the interest earned on that account "because the U.S. had

[6] The court of appeals affirmed in part and reversed in part on other aspects of the appeal that we need not describe.

no jurisdiction over it." *Id.* Likewise, where a defendant had provided false invoices to certain taxpayers as documentation of business expenses and advised those taxpayers to use those expenses as tax deductions improperly, we found sufficient evidence to sustain his conviction under section 7206(2). *United States v. McCrane,* 527 F.2d 906, 913 (3d Cir. 1975), *vacated on other grounds,* 427 U.S. 909, 96 S.Ct. 3197 (1976).

Finally, other courts of appeals, in cases involving similar factual scenarios where defendant employers disguised certain wages by issuing paychecks from non-payroll accounts, have affirmed convictions under section 7206(2) where the defendants' conduct included, but apparently was not limited to, furnishing false W-2s. *See, e.g., MacKenzie,* 777 F.2d at 820; *Isaksson,* 744 F.2d at 577-78. These courts, however, did not address specifically the relationship between sections 7204 and 7206(2).

The legislative history of section 7204, cited by both sides, clearly establishes that Congress intended the "in lieu of" language to ensure that the section 7204 penalties displaced the more severe penalties in other provisions of the Internal Revenue Code setting out both felonies and misdemeanors. H.R.Rep. No. 2333, 77th Cong., 2d Sess. at 132 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. at 172 (1942) ("These penalties are prescribed in lieu of the penalty imposed by § 145 of the Code, and are much less severe than those displaced."). Beyond this point, which, in any event, the "in lieu of" phrasing of section 7204 itself adequately captures, the parties' citations to section 7204's legislative history are largely inconclusive, inasmuch as that history fails to address its relationship to section 7206(2).

On the other hand, the timeline of amendments to the Code does lend some support to the government's position that evidence of the Gambones' furnishing of false W-2s can be used to support the section 7206(2) convictions. Congress enacted section 7204 as I.R.C. § 470(a) in 1942. Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 798, 892.[7] At that time section 7206(2) already was in place in the form of I.R.C. § 3793(b) in the Internal Revenue Code of 1939, Congress having enacted it in 1924. *See* Revenue Act of 1924, 26 U.S.C. § 1267 (1926). Conduct designed to assist an employee in filing a false return therefore already was punishable under section 3793(b), while failing to furnish a statement required under the Code (although not specifically applicable to the W-2 context, inasmuch as employers were not yet required to withhold) was punishable under I.R.C. § 145(a). Taking the legislative history at its word, section 470(a), enacted as part of the new withholding regime, was intended to displace the penalties under section 145, which set out misdemeanors in subsection (a), including for failing to furnish a statement, and felonies in subsection (b). There is no indication, however, that Congress intended section 470(a), now section 7204, to displace the penalty under section 3793(b). The legislative history therefore lends some support to the

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[7] Congress first required employers to withhold employees' income taxes in 1942; the 5% World War II "Victory Tax" on most employees' gross wages was the first vehicle for doing so. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 Buff. L. Rev. 685, 694-99 (1989); Peter W. Colby, Comment, *Federal Withholding on Employee Fringe Benefits for Income and Social Security Taxes*, 70 Cal. L. Rev. 178, 180-81 & n.19 (1982). The following year, Congress amended the Code to make withholding applicable to all income tax. *Id.*

government's argument that Congress did not intend section 7204 to preclude felony prosecutions of conduct involving, but not limited to, furnishing false statements.

Moreover, nothing in the language of either section 7204 or section 7206(2) or in the relevant legislative history, suggests that a jury may not consider the furnishing of false W-2s in deciding whether a defendant committed an offense under section 7206(2). Read together, these provisions stand for the less than remarkable proposition that a person who merely furnishes false W-2s is only culpable enough to deserve a misdemeanor conviction, while a person who goes further and willfully causes a false return to be filed is more culpable and is guilty of a felony. Thus, although the "in lieu of" language suggests that proof of the mere furnishing of false W-2s is insufficient as a matter of law to support a section 7206(2) conviction,[8] such evidence plus any other evidence suggesting a defendant's intent to cause a false return to be filed form a proper evidentiary basis for such a conviction. Indeed, *MacKenzie* and *Isaksson* implicitly applied this principle.

Thus, the government may prosecute conduct involving, but not limited to, furnishing false W-2s to employees under section 7206(2). Under *Graham*, the relevant inquiry is whether the defendant engages in "some affirmative participation which at least encourages" the

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[8] Allowing the jury to infer intent to aid and assist from the mere furnishing of false W-2s would subject a defendant who had engaged in precisely the conduct prohibited by section 7204 – no more and no less – to a punishment other than that prescribed by that section, thus ignoring the "in lieu of" language.

employee to prepare or present a false return. *Graham*, 758 F.2d at 885. Evidence of such affirmative participation that includes, but is not limited to, furnishing false W-2s is sufficient to sustain a conviction under that provision.[9] Finally, such affirmative participation need not rise to the level of actual counseling, as the Gambones sometimes seem to suggest, as long as it "at least encourages" the preparation or presentation of a false return.

b. *Sufficiency of the Evidence*

Given the foregoing framework, the government presented sufficient evidence to sustain the 59 section 7206(2) aiding and assisting convictions. To be sure, there was no direct evidence that either of the Gambones explicitly counseled any of the 59 employees to underreport their

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[9] The Gambones also argue that other conduct ancillary to furnishing false W-2s – details such as the preparation of employee time cards, the use of separate, nonpayroll checks for overtime wages, and the extra accounting necessary to accommodate a false W-2 scheme – should in effect merge with the furnishing of false W-2s, so that evidence of such conduct likewise would be insufficient on its own to sustain a section 7206(2) conviction. Because this position lacks any support in the statutory text, legislative history, and applicable caselaw, we reject it. If a defendant goes beyond merely furnishing false W-2s, and if the jury finds his conduct to constitute affirmative participation that encourages employees to file false returns, it may convict him of a felony under section 7206(2). The Gambones suggest that, because "every fraudulently understated W-2 opens the possibility" of such ancillary conduct, in every section 7204 case the facts also would support a section 7206(2) conviction. Joint Br. of Appellants at 26. Nevertheless we are satisfied that persons who furnish false W-2s may avoid felony convictions so long as they either eschew such ancillary conduct altogether, or at least engage in such conduct in such a way that a jury does not believe to constitute affirmative participation that willfully encourages employees to file false returns.

income. There was, however, ample circumstantial evidence to allow the jury to conclude that the Gambones aided and assisted them in doing so by encouraging exactly that behavior.

The essential elements of an offense under section 7206(2) are (1) that defendant aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return; (2) that the return was fraudulent or false as to a material matter; and (3) that the act of the defendant was willful. I.R.C. § 7206(2). *See United States v. La Haye,* 548 F.2d 474, 475 (3d Cir. 1977); *see also United States v. Hooks,* 848 F.2d 785, 788-89 (7th Cir. 1988). There appears to be no dispute as to the falsity of the employees' returns and as to the materiality of the false statements. The Gambones challenge the sufficiency of the evidence only on the issue of whether they aided or assisted the filing of those returns and whether their actions were willful. Through the testimony of two controllers of Gambone Brothers, Frank Ruser, who worked in that position from 1972 to 1981, and Thomas Gaasche, who was controller from 1985 until April 2000, the government established that there was a scheme to pay employees' overtime wages from nonpayroll accounts, paying "straight time," and failing to withhold tax from the overtime wages and to disclose those wages to the IRS. Thus, when Ruser expressed his concerns about how overtime was paid, Tony Gambone responded, "It's my business, stay out of it." *Id.* at 662. Similarly, Gaasche testified:

> I was probably only working there, you know, six to ten weeks when I – you know, looking at payroll, and I realized at that point everything going through payroll was just a flat 40 hours. And,

> you know, I thought it – I don't like this, this seemed improper to me. And I went to Jack Gambone and I went in his office and I said, Jack, I don't – I don't think we're handling payroll right, I don't know why we're doing this, why is it only showing 40 hours and then the other is on a separate check? And I don't recall verbatim what he said, but basically he said, well, this is their mad money, you know, they take one check home and the old lady don't have to know about the other one. And I said – at that time I said, well, I don't know why you'd stick your neck out for them and help them hide money from their wives. I said, you know, if it gets audited you're probably going to wind up paying both your share and their share of the social security and Medicare taxes.

Id. at 1731-32.

Notwithstanding the controllers' concerns the practice persisted. In 1995 the IRS audited Gambone Brothers which then for a short time began paying overtime through payroll. After some time, however, Gaasche confronted Tony Gambone about what he suspected was a false expense reimbursement, and Gambone responded, "[I]t's my company. I can pay whoever I want however I want and as much as I want." *Id.* at 1828. The government also produced the testimony of four employees who worked under the controllers in the accounting department, a receptionist who worked at Gambone Brothers for over 20 years, and 20 field workers and supervisors, all of whom testified that they received overtime wages off payroll. Moreover, the witnesses were aware that Gambone Brothers neither withheld tax from nor reported those wages, and they understood that they should not report those wages to the IRS either. Many witnesses also testified that

Gambone Brothers gave employees who were to receive raises the option of having the money paid on or off payroll.

The Gambones suggest that the testimony of these 25 employees is insufficient to prove that they willfully aided or assisted the preparation of false returns because none of the employees testified that the Gambones directly counseled them to do so. As we discussed above, however, the government did not have to prove that the Gambones directly counseled employees to file false returns. Rather, it was sufficient for the government to demonstrate that they engaged in some affirmative conduct that at least encouraged them to do so. The Gambones contend that their role was limited to providing false W-2s and that they had no interest in whether or not the employees reported their overtime wages. The overwhelming weight of the evidence, however, establishes that this is not an accurate characterization of the Gambones' conduct. Given the testimony of all of the witnesses just mentioned, there plainly was sufficient circumstantial evidence to support a finding that the Gambones engaged in a long-running scheme to encourage their employees to file false returns. The Gambones not only furnished false W-2s to scores of employees, but also created false employee time cards, engaged in intricate and deceptive bookkeeping intended to mask underreported income, and issued checks to employees from nonpayroll accounts for unreported overtime wages.

The parade of employees testifying that they understood the Gambones' actions as a sign that they should not report their overtime wages is evidence in itself that the Gambones, through this pervasive, ongoing scheme, took affirmative steps to encourage the employees to file false

returns.[10] Furthermore, some witnesses testified that agents of the Gambones, including John Zangari, a superintendent involved in hiring new employees, and certain foremen informed them more specifically that Gambone Brothers' "straight-time" policy meant that they should not worry about reporting overtime income. When pressed further, Zangari told these employees that Gambone Brothers would take care of any problems that might arise out of employees' failure to report overtime income. One employee testified Zangari told him that he should quit if he did not want to be paid under the "straight-time" system, and Zangari testified that when he told Jack and Tony Gambone about another employee's request that taxes be withheld from all of his pay, the Gambones told him the employee's only options were to receive a "straight-time" check, not to work overtime at all, or to quit. Finally, Zangari, who, from 1989 to 1993, was the company's "overall superintendent," overseeing all jobs performed during that time period, testified that he informed all newly hired employees up-front of the "straight-time" policy, and that he spoke daily with Tony Gambone, mentioning in their discussions every new employee hired.

Cumulatively, this evidence supports an inference that the Gambones, either themselves or through their agents, encouraged employees not to report overtime

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[10] Curiously, the Gambones appear to concede that there was evidence supporting this inference. Joint Br. of Appellants at 26 ("There was also evidence enough to conclude that the Gambones intended to make it possible for their employees not to report all of their wage income by issuing false W-2s, and that some employees so understood it.").

income. Employees were informed that Gambone Brothers would pay straight time for overtime, not report overtime income, and take care of any problems that might arise. As a result, some employees testified that they felt obligated not to report overtime income for fear of blowing the whistle on Gambone Brothers or on their fellow employees. The evidence supports the inference that the Gambones intended exactly that result, inasmuch as inconsistent reporting would have pointed to their own underreporting, which they had taken great pains to hide by creating false employee time cards and manipulating the company's books. In any event, although there was little evidence suggesting that the Gambones explicitly advised employees to file false returns, there is ample circumstantial evidence showing that they took affirmative steps to encourage them to do so. Accordingly, a reasonable jury could have concluded that the Gambones knowingly aided and assisted in the preparation of tax returns of 59 employees that contained materially false statements and, thus, the evidence supported the convictions for violations of section 7206(2).

3. *Conspiracy Convictions*

To sustain its burden of proof on the crime of conspiracy to defraud the United States, the government had to prove: (1) the existence of an agreement; (2) an overt act by one of the conspirators in furtherance of the objective; and (3) an intent on the part of the conspirators to agree as well as to defraud the United States. *See United States v. Rankin,* 870 F.2d 109, 113 (3d Cir. 1989) (citing *United States v. Shoup,* 608 F.2d 950, 956 (3d Cir. 1979)). The indictment described three ways in which the Gambones conspired to defraud the United States by: skimming cash

from Gambone Brothers and failing to report it as income on their own personal returns; paying and not reporting employee income from overtime wages and aiding and assisting those employees in filing false returns; and not reporting payments to subcontractors and therefore aiding and assisting those subcontractors in their failure to report that income.

We will affirm the convictions as long as we find that there was sufficient evidence with respect to one of the three alleged prongs of the conspiracy. *See United States v. Syme,* 276 F.3d 131, 144 (3d Cir. 2002) (citing *Griffin v. United States,* 502 U.S. 46, 49-50, 112 S.Ct. 466, 469-70 (1991)). The evidence discussed above with respect to the substantive convictions under section 7206(2) also supports convictions under the second prong of the conspiracy count. In particular, that evidence allowed a jury to conclude that the Gambones (1) had an agreement, the purposes of which were to avoid paying their share of social security and Medicare taxes and to encourage employees to go along with the scheme by filing false tax returns, (2) committed a number of overt acts in furtherance of those objectives by furnishing false W-2s, falsifying employee timecards, paying overtime wages off-payroll, and engaging in deceptive bookkeeping, and (3) intended both to agree to defraud and to defraud the United States. There was therefore sufficient evidence to sustain the conspiracy convictions.

The evidence was sufficient to sustain convictions for the cash skimming conspiracy as well. Gaasche testified that Gambone Brothers received payments predominantly by check, and that the largest of the infrequent cash payments he recalled seeing when he was controller was approximately $3300. Three home purchasers testified

that they delivered cash in payment for extras – respectively $10,750 in 1995, $50,000 in 1994, and a total of $105,805 in 1994 and 1995. None of these cash payments were recorded on Gambone Brothers' books. Furthermore, Robert Sylvester, Jack Gambone's brother-in-law, testified that he resided with the Gambones for 20 years and that he frequently observed Jack Gambone in possession of sums of cash. He testified that Jack would tell his wife, Sandra, to hide the cash until she could use it to buy savings bonds, which, Jack told Sylvester, were a good vehicle for hiding cash inasmuch as the income from the bonds is not reported to the IRS until they are cashed.

Sylvester also testified that he once saw Jack in possession of $30,000 in cash, and that on another occasion he accompanied Sandra to the bank, where she purchased $60,000-70,000 in savings bonds. When Pennsylvania state police officers executed a search warrant at Jack's house on August 25, 1994, they located $60,000 in a safe and $12,000 in Jack's nightstand. When a federal search warrant was executed on December 6, 1995, $65,815 was seized from the safe, of which $30,000 belonged to Sylvester. Bank records revealed that Sandra paid a total of $62,750 in cash to purchase savings bonds between June 24, 1994, and July 21, 1995. Moreover, Gaasche testified that in 1995 Jack told him that the FBI had been "snooping around," and that he should record $150,000, which Jack had received and split with Tony, on the company's records. Taken together, this evidence is sufficient to sustain a finding by the jury that Jack and Tony Gambone conspired to defraud the United States by skimming cash from Gambone Brothers and failing to report that cash on their personal income tax returns.

By discussing the evidence only on the first two prongs of the conspiracy indictment we do not imply that the evidence did not support a conviction on the basis of the third prong. Rather, we do not find it necessary to discuss that evidence. We do note, however, that there was substantial evidence to support it.

B. Improper Remarks During Rebuttal

1. *Standard of Review*

The Gambones argue that they are entitled to new trials by reason of the prosecutor's improper statements in her rebuttal closing argument. We make a harmless error analysis when deciding whether a new trial is warranted because of improper remarks made by the prosecutor during closing arguments. *See United States v. Zehrbach,* 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc). "The harmless error doctrine requires that the court consider an error in light of the record as a whole, but the standard of review depends on whether the error was constitutional or non-constitutional. . . . [N]on-constitutional error is harmless when 'it is *highly probable* that the error did not contribute to the judgment.' . . . 'High probability' requires that the court possess a 'sure conviction that the error did not prejudice' the defendant." *Id.* (citations omitted). If the error was constitutional, the court may affirm "only if the error is harmless beyond a reasonable doubt." *United States v. Molina-Guevara,* 96 F.3d 698, 703 (3d Cir. 1996).

2. *Analysis*

In opening statements, the prosecutor set forth the evidence the government planned to introduce to corroborate Sylvester's testimony regarding the Gambones' plot to

skim cash from the company and to hide that cash by purchasing savings bonds:

> And later, based on . . . information [provided by Sylvester], search warrants were executed, . . . and guess what, they corroborated what Mr. Sylvester said. A year later in '95 . . . over $65,000 cash and almost a million dollars face value savings bonds were found in a safe in Jack Gambone's house. And you'll hear how many of those savings bonds were purchased with cash from a bank representative.

J.A. at 184. Later in the trial, however, the court excluded evidence of the bonds because the government was unable to lay a foundation for admission of any but a small fraction of the bonds ($62,750, as discussed above) by showing that they were purchased with cash.

In his closing, Thomas A. Bergstrom, counsel for Tony Gambone, after reviewing impeachment evidence concerning Sylvester's incentive to lie to obtain a lesser sentence for a drug conviction, raised the bond issue:

> And I'm going to tell you this because part of me says stay away from it, Bergstrom, but part of me says you've got to know, because you heard it in the Government's opening argument. They came in front of you and argued to you, three and a half weeks ago, that there's a million dollars in bonds. Well, guess what? There isn't a million dollars in bonds. They didn't show you a million dollars in bonds at all. They showed you some bonds that were purchased between June of '94 and July of '95. My recollection tells me those bonds totaled about $65,000. . . . So, you know, the Government had their moment here. They . . . opened with, the million dollars in bonds that

> they opened with, and that they haven't been able to prove. . . .

Id. at 3143-44. In rebuttal, the prosecutor, discussing the cash-skimming allegation, responded:

> It's all the money over all those other years. And again, they want to hide behind the fact that there's not a paper trail of cash. And they want to point their finger at Mr. Sylvester and they want to bring up that whole thing about the bonds. Well, you know, ladies and gentlemen, Judge Padova told you before Ms. Winters' opening that openings were about what the Government expected the evidence to show. And you saw that throughout this trial, various objections were made and Judge Padova would rule on them as he saw fit and you saw that evidence was excluded. So, if there's things we've said we were going to prove that we didn't, don't hold it against us. You heard the objections they made.

Id. at 3163-64.

At that point, Bergstrom objected. The court overruled the objection, stating that he would charge the jury "on that subject." The jury instructions, however, included only general statements as to the burden of proof, the fact that the defendants need not produce any evidence, the manner of ruling on objections according to the rules of evidence, and the fact that statements and arguments of counsel are not evidence. The court did not give a specific curative instruction with respect to the prosecutor's remarks.

The parties do not dispute that the prosecutor's remarks were improper.[11] In *United States v. Mastrangelo,* we outlined three factors to consider in determining whether improper comments are prejudicial: the scope of the comments within the context of the entire trial, the effect of any curative instructions given, and the strength of the evidence against the defendant. 172 F.3d 288, 297 (3d Cir. 1999); *see also United States v. Zehrbach,* 47 F.3d at 1265.

The third factor, the strength of the evidence against the Gambones, weighs in favor of the government. It should be noted at the outset that the substance of the prosecutor's remarks establishes at most the purchase of bonds, not illegal bond acquisition. Nevertheless, any prejudicial effect from the prosecutor's remarks would go to evidence of cash-skimming, the first prong of the conspiracy count. The government needed to prove only one prong in order to establish a conspiracy, and the district court found that two other prongs were proven. Further, the jury had the witness testimony of Robert Sylvester

[11] The government appears to have abandoned an argument it raised in the district court, that the "invited error" doctrine should apply. That doctrine "teaches that where a prosecutorial argument has been made in reasonable response to improper attacks by defense counsel, the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial." *United States v. Pungitore,* 910 F.2d 1084, 1126 (3d Cir. 1990) (citing *United States v. Young,* 470 U.S. 1, 12-13, 105 S.Ct. 1038, 1045 (1985)). The doctrine does not apply, however, where defense counsel's attacks are proper, "vigorous advocacy." *Molina-Guevara,* 96 F.3d at 705. As the district court found, defense counsel did nothing improper by pointing out that the government did not prove every fact alleged in the indictment or raised in opening statements. The government has not advanced the invited error theory on appeal.

upon which to base a prong one verdict, and we have held that probative evidence on the same issue as improper remarks may mitigate prejudice stemming from those remarks. *Gambone,* 167 F.Supp.2d at 827; *see United States v. Helbling,* 209 F.3d 226, 242 (3d Cir. 2000) ("[A]lthough the prosecutor's comments may have been a pointed assertion of Helbling's guilt, the characterizations were related to the charges contained in the indictment which the evidence presented later did in fact establish. Accordingly, we find prejudice to be lacking.").

Similarly, the first factor, the scope of the improper comments within the context of the whole trial, weighs in favor of the government. Not only was the Sylvester testimony presented as evidence of cash-skimming, the government successfully introduced evidence concerning approximately $65,000 in bonds to corroborate Sylvester's testimony.[12] Although this amount falls short of a million,

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[12] The Gambones argue that the effects of the prosecutor's comments seeped well beyond the confines of the cash-skimming prong, infecting the entire trial with unsupported, "jury-arousing" allegations. They argue that the prosecutor's use of the word "objections" was meant to refer to the over 200 defense objections sustained during the trial: "[T]he jury simply could not have understood the government's egregious remarks as restricted to the prong 1 conspiracy. The explicit references to other excluded evidence could only lead the jury to conclude that there was all sorts of evidence of the defendant's guilt which was being kept from them by the defense objections." Joint Br. of Appellants at 42-43. We reject this argument, which makes ambitious use of the prosecutor's pluralization of the word "objection" when we consider it in the context of the rebuttal argument as a whole. Defense counsel only mentioned the bonds when discussing Sylvester's credibility and testimony concerning the cash-skimming scheme, and the government only referred to defense "objections" while discussing this same point.

as a legal matter the value of the bonds is not a critical factor in determining whether there was an unlawful conspiracy. Further, the prosecutor's objectionable comment amounts to less than half of a page out of over 3200 pages of trial transcript prior to jury deliberations. It represented only a fleeting moment in a four-week trial, in which the court sustained more than 200 objections by the defendant.

Thus, the district court was correct to distinguish this case from *United States v. Mastrangelo,* 172 F.3d 288, and *Molina-Guevara.* In *Mastrangelo*, the parties had stipulated that the defendant "had the chemical background to know the ingredients and equipment necessary to make methamphetamine," although the defendant had refused to stipulate that he knew how to make the drug. *Id.* at 295. In his closing, the prosecutor remarked both that the stipulation suggested that the defendant "knew . . . how to make methamphetamine" and that there was no evidence of anyone else in the conspiracy knowing how to make methamphetamine. *Id.* at 296. We held that these statements were improper because they mischaracterized the evidence in the record and impermissibly shifted the burden to the defendant to produce exculpatory evidence, influencing the case outcome. *Id.* at 296-97.

The Gambones argue that the prosecutor's statements impermissibly shifted the burden of proof by "telling the jury to hold any gaps in the evidence against the defendants." Joint Br. of Appellants at 41. We reject this argument as the court made clear in its charge that the burden of proof throughout the case remained with the government and, in any event, even without the court's charge we are satisfied that the prosecutor's statements would not have had the effect that the Gambones suggest. In this

regard, we point out that *Mastrangelo* is distinguishable as the prosecutor's remarks here at most explained the reason for the government's failure of proof and thus did not imply that the Gambones had any obligation to produce exculpatory evidence. Moreover, there was substantial evidence to support all the prongs of the conspiracy count including witness testimony about cash-skimming to which the prosecutor's statements did not relate.

Similarily, *Molina-Guevara* is distinguishable from this case. In *Molina-Guevara* the government called one customs agent to testify to the defendant's involvement in a drug conspiracy but chose not to call a second agent who also had questioned the defendant. After counsel for the defendant challenged the witness' credibility during his closing argument, the prosecutor suggested during rebuttal that counsel for the defendant did not call the second agent to testify because that agent would have corroborated the testimony of the first agent. 96 F.3d at 703. In *Molina-Guevara*, the prosecutor's comments about the credibility of government agents was influential of case outcome, as it determined the crucial issue of whether defendant was involved in a drug conspiracy. *Id.* at 705. In this case, other evidence established the conspiracy.

Thus, the first and third factors weigh very strongly in the government's favor. As a result, even though no specific curative instruction was provided to the jury, we hold that the error was harmless beyond a reasonable doubt, and the Gambones are not entitled to a new trial by reason of the prosecutor's comments. Accordingly, we need not determine whether the comments constituted constitutional or nonconstitutional error, as the higher standard is met.

C. Prejudicial Spillover

"Generally, invalidation of the convictions under one count does not lead to automatic reversal of the convictions on other counts." *United States v. Pelullo,* 14 F.3d 881, 897 (3d Cir. 1994). "[P]rejudicial spillover analysis under *Pelullo* begins by asking whether any of the evidence used to prove the reversed count would have been inadmissible to prove the remaining count (*i.e.*, whether there was any spillover of inadmissible evidence). If the answer is 'no,' then our analysis ends, as the reversed count cannot have prejudiced the defendant." *United States v. Cross,* 308 F.3d 308, 318 (3d Cir. 2002). If there was any spillover, we must ask whether the error was harmless, that is, whether it is highly probable that the error did not prejudice the jury's verdict on the remaining counts. *Id.* at 318-19.

The Gambones' arguments on this issue center on the assertion that they also advanced with respect to their insufficient evidence argument on the conspiracy count, that the government failed to prove that they "engaged in a colossal 20 year tax fraud scheme whereby enormous amount [sic] of cash were skimmed from their business and omitted from their tax returns each year from 1975 to 1995." Joint Br. of Appellants at 49. They argue that the evidence of such a plot was "non-existent," a position belied by the evidence already summarized. The Gambones further suggest that any evidence that was admitted in support of the personal tax evasion counts (not only the conspiracy count, but also the substantive counts as to which the district court granted judgments of acquittal) amounted to nothing more than unsupported "jury-arousing" accusations that portrayed the defendants as massive tax evaders who wished, in the words of the

prosecutor, "to cheat the IRS in as many ways as they could." J.A. at 3050. The Gambones conclude that, because those characterizations were, in their eyes, proven to be inaccurate, the spillover effect of the jury-arousing statements tainted the entire trial, requiring that we reverse their convictions on the counts that survived the district court's order partially granting their motions for judgments of acquittal.

As we discussed above in detail, there was sufficient evidence to sustain the conspiracy conviction on either of the government's first two theories, that is, on the cash-skimming prong and the "overtime/expense reimbursement/'off-payroll' fraud" prong. The unsubstantiated counts are therefore Counts Two and Three charging the Gambones with the substantive offenses of subscribing to false personal tax returns for the year 1994.[13] The district court granted the Gambones' motions for judgment of acquittal on these charges because the government had not introduced evidence that would allow the jury accurately to pinpoint exactly when they received cash from

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[13] We recognize that the jury found the Gambones not guilty on two of the 61 counts charging them with aiding and assisting in the preparation of their employees' false individual income tax returns. It is clear, however, that inasmuch as the jury convicted the Gambones on the remaining 59 of these counts and the court denied their motions for acquittal on those counts, there could not possibly have been a spillover effect from the evidence on the two counts on which they were acquitted, and the Gambones do not contend otherwise. Rather, they contend that reversal of the remaining 59 counts "for insufficiency will also require [us] to assess the spillover effect of those invalidated counts." Joint Br. of Appellants at 50 n.9. Of course, inasmuch as we are affirming the convictions on these counts we need not make the analysis that the Gambones believe might be necessary.

the company that may have gone unreported. *Gambone,* 167 F.Supp.2d at 815-17. Nevertheless, the district court reasonably found that evidence was presented to suggest that the business received substantial amounts of cash and that the Gambones received distributions of this cash at some point, though it ultimately found that there was not evidence suggesting that the Gambones received the cash in 1994. *Id.*

The evidence introduced to prove Counts Two and Three also would have been admissible at a trial limited to the remaining valid counts. That evidence, which focused on the allegedly false personal tax returns for the year 1994, was merely a subset of the evidence supporting the government's allegation that the Gambones engaged in a long-running conspiracy to defraud the United States by skimming cash and failing to report that cash on their personal income tax returns. The Gambones seek to characterize that evidence of the false 1994 returns as jury-arousing. If that evidence contributed to a picture of the Gambones as major tax evaders over the course of 25 years, however, it is for good reason; that is exactly what was alleged in Count One, on which the jury convicted the Gambones. Thus, although the evidence introduced to support Counts Two and Three, according to the district court, would not have allowed a reasonable jury to pinpoint the exact year in which the Gambones skimmed cash that may have gone unreported, that evidence would have been admissible at a trial on the cash-skimming conspiracy charge. Our analysis need continue no further. Nonetheless, we also note that, inasmuch as there was very strong evidence to sustain a conviction under the second prong of the conspiracy count, *i.e.*, the underreporting of employees' wages, and to sustain the convictions on the 59

counts of aiding and assisting in the preparation of employees' false returns, even if there had been impermissible spillover, any error would have been harmless. Thus, we are satisfied that the Gambones are not entitled to new trials predicated on an adverse spillover effect from the counts on which they were acquitted.

D. Jury Instructions

1. *Standard of Review*

The Gambones contend that they are entitled to reversals and new trials on the aiding and assisting counts because the court's instructions on those counts were erroneous. Inasmuch as they did not object to the instructions at trial, we examine the charge for plain error. *See United States v. Retos,* 25 F.3d 1220, 1228 (3d Cir. 1994). Thus, for us to grant them relief "[t]here must be an 'error' that is 'plain' and that 'affects substantial rights.' Moreover, [Fed.R.Crim.P.] 52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 1776 (1993)). "[I]t is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *United States v. Gordon,* 290 F.3d 539, 545 (3d Cir. 2002) (internal quotation marks omitted).

2. *Analysis*

The Gambones challenge the portion of the jury charge relating to the aiding and assisting counts in which

the district court stated: "I instruct you as a matter of law that if you find beyond a reasonable doubt that a defendant willfully furnished, prepared or caused to be prepared false and fraudulent documents which the defendant knew would be relied on in the preparation of income tax returns and would result in returns which were materially false . . . then the Government has met its burden of proof in this element. . . ." J.A. at 3257.

When reviewing a jury instruction for plain error, the "analysis must focus initially on the specific language challenged, but must consider that language as part of a whole." *Gordon,* 290 F.3d at 544. We recognize that if taken in isolation the challenged instruction would be erroneous as a juror reasonably could interpret it as allowing a conviction even though the Gambones merely had provided employees with false W-2s without further encouraging them to file false tax returns. In context, however, the error is not plain. The instruction on this point began:

> Okay. Now let's focus on aiding and abetting. What is it, what can it be? Where should your focus be with respect to whether there has been aiding and abetting?
>
> *First let me state that it is not enough, it is not enough for the Government to establish only that the individual taxpayers listed in Count 7 through 67 received a Form W-2 that did not include all of their income. That's not enough to make the charge. If that's all there is, it's not enough to make the charge.*
>
> In order for the Government to establish that Anthony Gambone or John Gambone aided and abetted those individuals in filing a false

> return, you must find first that the return they filed was indeed false. Secondly, that the individual taxpayer in fact had income from Gambone Brothers that was not reported on this tax return; thirdly, that the failure to report was the cause of the unlawful assistance of the defendant; and fourthly, that *besides giving the taxpayer an incorrect Form W-2*, Anthony or John Gambone did something else to aid that particular taxpayer in filing [a] false return, *besides proving an incorrect Form W-2 or transmitting an incorrect W-2.*
>
> And as to each taxpayer, members of the jury, you must affirmatively decide that the Government has proven beyond a reasonable doubt that the defendant did something to aid and assist that taxpayer *besides simply and only providing an incorrect W-2 form*. And you have heard all of the evidence with respect to everything that was going on. You don't have to determine what was going on, and then determine whether there was aiding and assisting under the definition as I've just given it to you.

J.A. at 3255-56 (emphasis added). After an additional paragraph the court gave the challenged portion of the charge.

In the four paragraphs of the charge that we have quoted, the district court made abundantly clear that the jury could not convict the Gambones on the aiding and assisting counts unless the jury found that they engaged in conduct beyond simply providing false W-2s. Thus, even though the challenged portion of instruction in itself is not

consistent with four paragraphs we have quoted,[14] and the court's use of the phrase "as a matter of law," was erroneous, in the context of the charge as a whole this statement was not prejudicial. Indeed, it is probably for exactly that reason that the Gambones' attorneys did not object to the charge at the trial. Furthermore, given the substantial evidence pointing to the Gambones' guilt and the overall fairness of the proceedings, any error clearly did not affect substantial rights. *See Retos,* 25 F.3d at 1229 (stating that, under plain error analysis, the court of appeals will exercise its discretion to order correction where the defendant is actually innocent or where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings). The instruction was therefore not plainly erroneous and the Gambones are not entitled to new trials by reason of it.

[14] The contradiction, however, is not as flat as the Gambones suggest. The challenged instruction refers to "false and fraudulent documents" rather than specifically to W-2s, the only inappropriate document to consider without additional proof of encouragement.

III. CONCLUSION

For the foregoing reasons the district court properly denied the Gambones' motions for new trials and acquittals and the judgments of convictions and sentence entered December 13, 2001, will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-4424 and 01-4427

UNITED STATES OF AMERICA

v.

JOHN A. GAMBONE, SR.
a/k/a JACK

John A. Gambone, Sr.,

Appellant in 01-4424

UNITED STATES OF AMERICA

v.

ANTHONY GAMBONE
a/k/a TONY

Anthony Gambone,

Appellant in No. 01-4427

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. Nos. 00-00176-1 and 00-00176-2)
District Judge: Honorable John R. Padova

Argued October 17, 2002

BEFORE: ROTH and GREENBERG, *Circuit Judges*
and WARD, *District Judge*[*]

JUDGMENT

These causes came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and were argued on October 17, 2002. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgments of conviction entered and sentence entered December 13, 2001, are affirmed.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: January 3, 2003

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[*] Honorable Robert J. Ward, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	)	
	)	Criminal Action
v.	)	
	)	No. 00-176-1, 2, 3, 6
JOHN GAMBONE, SR.,	)	
ANTHONY GAMBONE,	)	
WILLIAM MURDOCK, AND	)	
ROBERT CARL MEIXNER	)	

MEMORANDUM

Padova, J. **September 4th, 2001**

Before the Court are various post-trial motions filed by Defendants John Gambone, Sr., Anthony Gambone, William Murdoch, and Robert Carl Meixner, who were convicted on charges of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and individual charges of willfully subscribing false tax returns under penalty of perjury in violation of 26 U.S.C. § 7206(1). Defendants John Gambone, Sr. and Anthony Gambone were also convicted on 59 individual counts of aiding and assisting in the filing of fraudulent tax documents in violation of 26 U.S.C. § 7206(2). For the reasons that follow, the Court grants the Motion for Judgment of Acquittal as to Defendant John Gambone, Sr. on Count 2, but denies the Motion as to said Defendant on all other counts. The Court grants the Motion for Judgment of Acquittal as to Defendant Anthony Gambone on Count 3, but denies the Motion as to said Defendant with respect to all other counts. The Court denies the Motion for Judgment of Acquittal as to Defendant William Murdoch on the

conspiracy count (Count 1), but grants judgment of acquittal as to said Defendant on the substantive count (Count 4). The Court grants the Motion for Judgment of Acquittal as to Defendant Robert Carl Meixner on the conspiracy count (Count 1), but denies the Motion as to said Defendant on the substantive count (Count 6). The Court denies Defendants' Motions for a new trial on all asserted grounds.

I. Background

On November 17, 2000, Defendants John Gambone, Sr., Anthony Gambone, William Murdoch, and Robert Carl Meixner, were convicted following a jury trial of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (Count 1). The individual defendants were also convicted of willfully making and subscribing false tax returns in violation of 26 U.S.C. § 7206(1) (Count 2 – John Gambone, Sr.; Count 3 – Anthony Gambone; Count 4 – William Murdoch; Count 6 – Robert Carl Meixner). Defendants John Gambone, Sr. and Anthony Gambone were convicted of 59 counts of willfully aiding and assisting in the preparation of false tax returns (Counts 7-42, 44-56, 58-67). At trial, each of the Defendants moved for judgment of acquittal on all of the counts pursuant to Federal Rule of Criminal Procedure 29(a).[1] The Court reserved decision on

[1] Defendants Anthony and John Gambone, Sr. moved for judgment of acquittal as to Counts 7-67. N.T. 11/7/00 at 161; N.T. 11/8/00 at 3. Anthony Gambone also moved for acquittal on Counts 1 and 3. Doc. No. 164. Defendant William Murdoch moved for judgment of acquittal on Counts 1 and 4. N.T. 11/9/00 at 215. Defendant Robert Carl Meixner moved for acquittal on Counts 1 and 6. Doc. 165. The Court accepted

(Continued on following page)

the motions pursuant to Rule 29(b).[2] After verdict, Defendants renewed their motions pursuant to Rule 29(c).[3] Defendants also moved for a new trial on various grounds.[4]

II. Legal Standard

A. Sufficiency of the Evidence

In deciding a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 on the basis of insufficiency of the evidence, the district court must determine whether the Government has adduced sufficient evidence respecting each element of the offense charged to permit jury consideration. *United States v. Giampa,* 758 F.2d 928, 934 (3d Cir. 1985). The district court cannot and should not weigh the evidence. *Id.* Neither is the court permitted to make credibility determinations. *Id.* at 935.

Rule 29 motions with respect to the other counts and other defendants. N.T. 11/9/00 at 215.

[2] The Court reserved decision on Counts 7-67. N.T. 11/8/00 at 10. At the close of the Government's case, the Court reserved decision with respect to all the motions for judgment of acquittal. N.T. 11/13/00 at 2, 52-53 (Count 3).

[3] Doc. 203 (12/7/00, John Gambone, Sr.); Doc. 210 (1/8/01, John Gambone, Sr.); Doc. No. 206 (12/11/00, Anthony Gambone); Doc. No. 204 (12/8/00, William Murdoch); Doc. No. 200 (12/7/00, Robert Carl Meixner). The Court extended the deadline for filing of the post-trial motions. N.T. 11/17/00 at 30.

[4] Doc. 210 (1/8/01, John Gambone, Sr.); Doc. 214 (1/29/01, John Gambone, Sr.); Doc. No. 205 (12/11/00, Anthony Gambone); Doc. No. 209 (12/12/00, granting leave to Robert Carl Meixner to join all post-trial motions of other defendants); Doc. No. 231 (5/4/01, William Murdoch – supplemental brief in support of motion for new trial).

A defendant bears a very heavy burden when challenging the sufficiency of the evidence supporting a jury's verdict. *United States v. Dent,* 149 F.3d 180, 187 (3d Cir. 1998). The evidence must be weighed in the light most favorable to the government and the verdict upheld so long as "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Voigt,* 89 F.3d 1050, 1080 (3d Cir. 1996). The defendant cannot "simply reargue [his] defense." *United States v. Smith,* 186 F.3d 290, 294 (3d Cir. 1999). The Court must find there is no evidence in the record, regardless of how it is weighed, from which the jury could have found defendant guilty. *United States v. McNeill,* 887 F.2d 448, 450 (3d Cir. 1989), *cert. denied,* 943 U.S. 1087 (1990). The defendant must overcome the jury's special province in matters involving witness credibility, conflicting testimony, and drawing factual inferences from circumstantial evidence. *United States v. McGlory,* 968 F.2d 309, 321 (3d Cir. 1992).

B. New trial

"On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Fed. R. Crim. P. 33. A new trial should be granted sparingly and only to remedy a miscarriage of justice. *United States v. Copple,* 24 F.3d 535, 547 n.17 (3d Cir. 1994).

III. Motions for Judgment of Acquittal

A. Conspiracy to Defraud the United States (Count 1)

Each of the Defendants was convicted of conspiracy to defraud the United States as charged in Count 1 of the Indictment. In order to sustain its burden of proof of the crime of conspiracy to defraud the United States, the government had to prove the following three elements beyond a reasonable doubt as to each defendant: (1) the existence of an agreement between at least two persons, one of whom is the defendant; (2) an overt act by one of the conspirators in furtherance of the objective of the agreement; and (3) knowledge and participation in the conspiracy by the defendant. *United States v. Adkinson,* 158 F.3d 1147, 1153 (11th Cir. 1998); *United States v. Furkin,* 119 F.3d 1276, 1278 (7th Cir. 1997); *United States v. Tedder,* 801 F.2d 1437, 1446 (4th Cir. 1986).

The indictment charges three means (prongs) of carrying out the conspiracy to defraud, by: (1) skimming cash from their businesses and not reporting it on their personal tax returns; (2) paying and not reporting employee income from overtime wages, wages given in the form of fraudulent expense reimbursement, and wages paid off-payroll, thereby aiding and assisting employees in the filing of false tax returns; and (3) not reporting payments to subcontractors, thereby aiding and assisting some subcontractors in the failure to report the income. Indictment ¶ 13. John Gambone, Sr. and Anthony Gambone were charged in all three prongs of the conspiracy, while Defendants William Murdoch and Robert Carl Meixner were charged only in the overtime/fraudulent expense reimbursement prong. Thus, in order to find that Defendants John Gambone, Sr. and Anthony Gambone are

entitled to judgments of acquittal, the Court would need to find that the evidence was insufficient as to each of the three prongs charged in the Indictment. In order to find that Defendants William Murdoch and Robert Carl Meixner are entitled to judgments of acquittal, the Court need only find that the evidence is insufficient as to the second prong.

The Court will begin with an analysis of prong two, in which all four of the Defendants were charged, and then proceed to analysis of prongs one and three with respect to Defendants John Gambone, Sr. and Anthony Gambone.

1. Overtime/Fraudulent Expense Reimbursement (Prong 2)

With respect to prong two of the conspiracy, the Court determines that the evidence was sufficient for any rational jury to find, beyond a reasonable doubt, that there was an agreement to defraud the United States and, further, that Defendants John Gambone, Sr. and Anthony Gambone were knowing and willful members of the subscheme. In the Overtime/Fraudulent Expense Reimbursement prong, the Indictment alleged that the Defendants conspired to defraud the United States by paying wages off-payroll and in the form of fraudulent expense reimbursement payments and failing to report this income, thereby assisting employees in filing false tax returns.

At trial, the following evidence was presented.[5] Frank Ruser and Thomas Gaasche, two controllers of the Gambone Brothers Construction Company, testified that overtime was being paid straight-time without any taxes taken out. N.T. 10/26/00 at 248-54, 256, 261 (Frank Ruser); N.T. 11/2/00 at 167-68, 262-64 (Thomas Gaasche). The testimony established that these policies regarding off-payroll payment of wages and non-reporting originated from John and Anthony Gambone directly, who further understood that the practice was improper. *See* N.T. 10/26/00 at 248-54, 256, 261 (Ruser); N.T. 10/31/00 at 47-49, 51 (John Zangari); N.T. 11/2/00 at 167-68, 262-64 (Gaasche); N.T. 11/3/00 at 70-73 (Cindy Murray).

Employees involved in payroll testified to the practice of paying employees their overtime wages in a separate check with no taxes withheld. N.T. 10/25/00 at 152-53 (Blendine Ozorowski); 11/3/00 at 70-73 (Cindy Murray). Numerous employees testified that they were paid in this manner, and that they understood that they need not report the income since there was no withholding. *See, e.g.,* N.T. 10/26/00 at 151 (Joseph Zeall); N.T. 10/27/00 at 35-36 (Karen Mengel); N.T. 10/27/00 at 84, 91 (Julia

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[5] Defendants assert that the only evidence that could properly be considered by the jury was that unrelated to the provision of the false W-2s, because 26 U.S.C. § 7204 provides the exclusive sanction for the provision of false W-2s to employees. The Court notes that even disregarding the actual provision of the false W-2s, the evidence was sufficient to support the jury's guilty verdict on the basis of the second prong of the conspiracy as to John Gambone, Sr., Anthony Gambone, and William Murdoch. With respect to the contention that all actions predicate to the filing of the W-2s also be eliminated from consideration, the Court refers to its more detailed discussion of that issue in the context of the § 7206(2) convictions.

Tamaki); N.T. 10/27/00 at 221 (Robert Olivieri); N.T. 11/1/00 at 206-07 (David Picariello). Individual employees testified to being told that the overtime was paid "off the books" or "under the table." N.T. 11/6/00 at 177 (Stephen King); N.T. 10/26/00 at 85-89 (Joseph Kuniewicz); N.T. 11/6/00 at 239-41 (James Leonard). John Zangari testified that when he hired new employees, he explained the overtime system and that "their overtime check was straight cash and it wouldn't be claimed." N.T. 10/31/00 at 39-40.

The Court concludes that the evidence presented at trial was sufficient such that any rational trier of fact could have found beyond a reasonable doubt the existence of a prong-two payment scheme.[6] All of the testimony, and the reasonable inferences drawn from it, was sufficient to establish that Defendants John Gambone, Sr. and Anthony Gambone created a company wide system that paid employees significant wages off-payroll, with no taxes taken out, with the intention that neither the company nor the employees would report the income. The system was designed to allow the company to pay less in total wages to its employees, but allow the employees to keep a greater share of the wages by defrauding the IRS. Moreover, the evidence provided a sufficient basis for the jury to conclude beyond a reasonable doubt that both John Gambone, Sr. and Anthony Gambone agreed to this conspiracy with knowledge and intent.

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[6] The evidence of the "straight-time" overtime aspect of the scheme was sufficient basis for a prong-two conviction.

Defendant William Murdoch contends that the evidence presented at trial was insufficient to establish that he joined the conspiracy with the intent to the defraud the United States. Murdoch claims that the evidence established only that he signed the checks, but established no knowledge with respect to the W-2s or 1099s or the failure of company's employees to report the income. The Court disagrees, and concludes that the evidence was sufficient to sustain his conviction.

The following evidence was presented at trial. Murdoch, who has worked at Gambone Brother since 1957, was the second signer on the payroll checks. N.T. 11/3/00 at 79 (Murray). The evidence established that the accounts payable checks for overtime went to John Gambone, Sr. and then to William Murdoch with the timecards attached. N.T. 10/25/00 at 217-18 (Ozorowski); N.T. 10/27/00 at 25-26 (Mengel). The timecards reflected all of the pay, including overtime paid off-payroll. N.T. 10/31/00 at 167 (Zangari). The timecards were marked "OP" by the payroll clerk. N.T. 10/27/00 at 80-81. Murdoch reviewed the checks and materials and would sometimes require changes in the amounts, or void them entirely. N.T. 10/27/00 at 80-81 (Mengel). Murdoch removed his check from among the signed checks. N.T. 10/27/00 at 44 (Mengel). There was also testimony establishing Murdoch's direct or inferred knowledge that employees were being paid such that taxes were not withheld. John Zangari and David Picariello testified that Murdoch was present when John Gambone, Sr. arranged to allow them to have mortgage payments taken out of their pre-tax earnings. N.T. 10/31/00 at 74-77 (Zangari); 11/1/00 at 218-24 (Picariello). Murdoch drew up papers and explained how such payments would work. *Id.* Picariello testified that it was Murdoch who explained to

him the benefit of having mortgage payments taken out pre-tax – that it would be "beneficial" because the taxes would be taken out of a lower amount. N.T. 11/1/00 at 222-23. It could be reasonably inferred from this testimony that Murdoch understood that the purpose of this arrangement was to allow the employee to refrain from reporting the income and, therefore, to avoid having to pay taxes thereon.

The Court determines that this evidence was sufficient to establish that Murdoch was a knowing and voluntary member of the conspiracy, and that he joined in the conspiracy's goal of defrauding the IRS. The evidence was sufficient for the jury to conclude that he had knowledge of the payment scheme, that he actively participated in it, and that he understood its goals. Murdoch's daily presence in the office of the company bolsters the reasonable inference that he possessed extensive knowledge of the conspiracy. The Court therefore denies Defendant Murdoch's motion for judgment of acquittal.

Defendant Robert Carl Meixner also contends that the evidence against him was insufficient to establish his membership in the conspiracy. At trial, the Government attempted to link Meixner to the conspiracy through his position as a field superintendent whose responsibilities included hiring employees and reviewing time cards. Notwithstanding Defendant's apparent opportunity to obtain knowledge of and to agree to the conspiracy, the Court agrees with Defendant that the evidence actually presented at trial was insufficient for any rational trier of fact to find beyond a reasonable doubt that he joined the conspiracy with the intent to defraud the United States.

In support of the conviction, the Government points to testimony that Meixner, in his position as Superintendent, authorized raises in the form of expense reimbursement. *See, e.g.,* N.T. 11/3/00 at 225-29 (Philip Honsberger); N.T. 11/3/00 at 176-78 (Richard Hunter); N.T. 10/27/00 at 207-08 (Paul Mills). In the Court's view, however, this evidence is insufficient to establish that Defendant Meixner had the intent to join the conspiracy to defraud the United States. In particular, the evidence did not establish that the expense allowances were intended to remain unreported, or that they did not cover legitimate vehicle expenses.[7] Though there was some testimony regarding particular employees who received such expense money without having legitimate expenses, the evidence at trial did not establish that Meixner's purpose in giving the "expense money as raises" was to further this conspiratorial objective of defrauding the IRS.

The Government points to specific testimony regarding conversations that Meixner had with other employees as proof of Meixner's knowledge and assent to the goals of the conspiracy. The Court, however, does not agree with the Government's characterization of the statements as they relate to proving such knowledge and agreement. First, the Court disagrees that Meixner's comment that employees should "sit on it," referring to the belated 1099s given to employees for their 1992 and 1993 unreported income, is fairly interpreted as evidencing prior knowledge

[7] The testimony regarding Defendant Meixner's hiring of employees thus differed in substantial respect from that offered by John Zangari, who held the same position at a prior time, and who described his discussions with employees regarding "straight-time for overtime."

of effort to flout rules.[8] Meixner's statement to John Zangari that "if we ever wanted to do anything, if we ever quit or did anything, all we would have to do is call the IRS and tell them the way we were paid" demonstrates knowledge that Meixner knew that he was being paid improperly, but does not go far enough in demonstrating an intent to join the defraud conspiracy. *See* N.T. 10/31/00 at 98-99 (Zangari). Similarly, his statement to Phillip Honsberger that "[i]f anything ever happened, Gambone would have to pay you half time, and that would – and everything would be a wash," reveals nothing about Meixner's knowledge of a conspiracy to defraud. N.T. 11/3/00 at 226-27. Though drawing inferences from circumstantial evidence is within the jury's special province, in this case the Court agrees that it is not possible to draw an inference from this testimony of Meixner's state of mind sufficient to support the proposition that he joined the conspiracy.

Thus, the Court concludes that the Government failed to provide evidence at trial that Defendant Meixner knew the goal of the conspiracy was to defraud the United States, and that he had the knowledge and intent willfully to join that conspiracy. At best, the evidence presented

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[8] The Government argues that "[i]n light of the other evidence of the Gambones' pattern of refusing to follow the rules despite being audited and told their practices were wrong, this statement [of Meixner] could be fairly interpreted as evidencing knowledge of efforts to do the same in 1995." Govt. Omnibus Brief at 30. The Court observes, however, that none of the evidence links this "pattern" of behavior with this particular Defendant. It would be circular to construe Meixner's comment in light of the actions and practices of the other conspirators in carrying out the conspiracy in order to prove that Meixner actually joined into an agreement with those other Defendants.

demonstrated only that Meixner came to know that he and perhaps other employees were being paid improperly.[9] This falls far short of establishing his agreement to defraud the United States. For that reason, the Court concludes that Defendant Meixner is entitled to judgment of acquittal as to Count 1 of the Indictment.

2. Cash Skimming (Prong 1)

The Court also determines that the evidence was sufficient to support the convictions of John Gambone, Sr. and Anthony Gambone based on the cash skimming prong of the scheme. Indictment ¶¶ 14-17. The following evidence was presented at trial. Defendant John Gambone received substantial sums of cash, N.T. 11/1/00 at 155-56 (Robert Sylvester), and he split the monies with his brothers Anthony and Joseph. N.T. 11/1/00 at 157 (Sylvester). Upon execution of the government search warrant, $65,815 was seized from a safe in John Gambone, Sr.'s house. N.T. 11/9/00 at 17 (David Patella). Of this amount, about $30,000 belonged to Robert Sylvester. N.T. 11/1/00 at 189. Cash was received in payment for "extras" on houses purchased from Gambone Brothers. N.T. 11/1/00 at 161; N.T. 10/30/00 at 33, 37, 43 (Anne Dozer). Other employees also testified to seeing cash come in through business transactions. N.T. 10/27/00 at 90 (Mengel); N.T. 10/31/00 at

[9] Notably, the Defendant's generic statements regarding how employees were paid might not even establish knowledge of wrongdoing by giving raises in the form of expense reimbursements. His statements might only have related to knowledge that the overtime aspect of the scheme was wrong. Because the evidence relating to Meixner's hiring practices were limited to giving raises in the form of expense allowances, this gap would be crucial.

104-106 (Zangari). John Gambone would bring home cash and give it to his wife, and tell her to purchase bonds if she could. N.T. 11/1/00 at 156, 162. On one occasion, John Gambone asked Robert Sylvester to accompany Mrs. Gambone to the bank with $70,000 for the purpose of purchasing savings bonds. N.T. 11/1/00 at 163-64. Tom Gaasche, the company controller, testified that in 1995, John Gambone, Sr., told him he had seen someone snooping around and that he thought it might be an FBI agent. N.T. 11/2/00 at 140-41. Gambone instructed Gaasche to book some $150,000 in funds, as well as funds to three individuals – John Gambone, Jr., Lydia Lupo, and Anne Dozer – all of whom worked for Continental Realty and had received commissions. N.T. 11/2/00 at 140-42.

The evidence at trial was thus sufficient for any rational jury to infer and conclude, beyond a reasonable doubt, that there was a prong one cash skimming sub-scheme as charged in the Indictment, and that John and Anthony Gambone agreed to this sub-scheme in order to defraud the United States. The evidence was sufficient for any rational trier of fact to determine beyond a reasonable doubt that cash was received from the business, that such cash was distributed to John and Anthony Gambone, and that funds were hidden and not reported, with at least some of the funds being used to purchase savings bonds.

3. Failure to Report Payments to Sub-Contractors (Prong 3)

With respect to the subcontractor scheme, Indictment ¶ 26, the evidence was also sufficient to sustain the jury verdict. The following evidence was presented at trial. Each year, a list of vendors paid during the year was printed. N.T. 10/27/00 at 98 (Julia Tamaki). This list would

go to Tom Gaasche, who would cross out corporations and any parties receiving less than $600. N.T. 11/2/00 at 192 (Gaasche). John Gambone, Sr., would then review the list and cross out some and circle others. *Id.* The circled parties would receive 1099s. *Id.* The lists had roughly 100-120 employees and 50-60 subcontractors. *Id.* at 193. Approximately 20-30 of the entities on the original list would receive 1099s. N.T. 10/27/00 at 100. Some entities that should have received 1099s were crossed off the list. *Id.* Moreover, Anthony Gambone negotiated lower rates with subcontractors on the basis that the Company would not report the income. N.T. 10/31/00 at 60-61 (Zangari) (statement by Gambone that "we're going to pay you this amount per square foot because we're not going to claim taxes.") John Zangari also negotiated lower rates with subcontractors in this manner. *Id.* at 61. One subcontractor testified about direct conversations with John Gambone and Anthony Gambone regarding the non-reporting of the income. N.T. 11/1/00 at 65-66 (David Ciabattoni).[10]

The evidence at trial provided sufficient basis for any rational trier of fact to find beyond a reasonable doubt that

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[10] At trial, Defendants argued that David Ciabattoni was actually a corporation and thus was not entitled to receive a Form 1099. Defendants presented evidence during cross-examination that at the time Ciabattoni worked for Gambones, he remained registered as a corporation. N.T. 11/2/00 at 69-70. However, the witness also testified that he had not acted as a corporation since 1989. N.T. 11/2/00 at 90. Furthermore, he testified that he arranged with Anthony Gambone to be paid with checks made out to him personally. N.T. 11/1/00 at 66. The Court concludes that, with respect to this aspect of the witness' testimony, Defendants have failed to overcome the jury's special province in the matter of witness credibility and conflicting testimony. *See McGlory*, 968 F.2d at 321.

a third-prong sub-scheme existed, and that John and Anthony Gambone joined and participated in such a sub-scheme in order to defraud the United States.

B. Substantive Counts (Counts 2, 3, 4, 6)

Each of the Defendants was charged and convicted with a substantive tax violation relating to false tax returns filed in 1993 or 1994, in violation of 26 U.S.C. § 7206(1). Section 7206(1) provides that: "Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter [shall be guilty of a crime]." In order to establish a violation of § 7206(1), the Government must establish that: (1) the defendant made and subscribed a return which was false as to a material matter; (2) the return contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return was true and correct as to every material matter; and (4) the defendant falsely subscribed to the return willfully, with the specific intent to violate the law. *United States v. Gollapudi,* 130 F.3d 66, 71-72 (3d Cir. 1997) (citing *United States v. Bishop,* 412 U.S. 346, 350 (1973)).

1. John Gambone, Sr. (Count 2)

In Count 2, Defendant John Gambone, Sr. was convicted of filing a false tax return for the year 1994 under penalty of perjury. Specifically, the Indictment charged that John Gambone, Sr. failed to report approximately $52,780 in unreported income. He moves for judgment of

acquittal on this Count, and contends that there was no evidence that he received the money in 1994, and further that there was insufficient evidence to demonstrate that the money should have been reported on the 1994 return. The Court concludes that, viewing the evidence in the light most favorable to the government, the evidence was insufficient for any rational jury to conclude beyond a reasonable doubt that John Gambone, Sr. was guilty of the Count 2 violation.

The key fact with respect to John Gambone, Sr.'s false tax return was the distribution to him of reportable cash in the year 1994.[11] The Government presented the following evidence at trial. Certain individuals made cash payments for extras on their houses, with at least some of these payments dating to 1994. N.T. 11/1/00 at 121, 124 (Barry Vesotsky); N.T. 11/3/00 at 15-16, 21-23, 24-25, 27-30 (Dok Su Yi). Anne Dozer, who worked at Continental Realty, also testified that extras were paid for in cash by the Vesotskys, the Yis, and the Koons. N.T. 10/30/00 at 33. She testified regarding particular change orders entered into with these homeowners. N.T. 10/30/00 at 53-68 (Yi), N.T. 10/30/00 at 72-74 (Koons). Dozer herself was sometimes involved in preparing and negotiating such change orders. N.T. 10/30/00 at 33.

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[11] Where an individual has an interest in a corporation, receipt of income by the corporation does not by itself constitute receipt of reportable income by the individual. *See United States v. Tbushin,* 899 F.2d 617, 622-24 (7th Cir. 1990). Thus, evidence showing that the company received cash in 1994 without evidence that John Gambone, Sr. also received a distribution in 1994 would be insufficient to support the § 7206(1) conviction.

The evidence was sufficient for the jury to find that substantial amounts of cash were received by the business. Missing, however, was evidence establishing that John Gambone, Sr. received his distribution of this cash during 1994. Dozer testified that she received her commissions from the cash payments at the time they were made, or shortly thereafter, and that she received some of the commissions in 1994. N.T. 10/30/00 at 42-43, 69. She testified that once the money was received for payment of extras and the commissions were taken out, that the money then went to the "Gambone Brothers office." N.T. 10/30/00 at 71. The fact that Dozer received her commissions in 1994, however, does not support an inference on this record that John Gambone, Sr. personally received his distribution of reportable income from Gambone Brothers in 1994. Dozer's actual testimony only established that the funds went to the company's office, and not to John Gambone, Sr. personally.[12]

The testimony of Thomas Gaasche, the company controller, also failed to place the timing of the distribution in 1994. Gaasche testified that in 1995, John Gambone, Sr. came into his office and told him he had seen someone snooping around one of the samples, and that he thought

[12] During oral argument, the prosecutor stated that Anne Dozer "testified [that John Gambone, Jr.] gave [the cash] to his father in that time period." N.T. 11/9/00 at 222. Examining the record, the Court determines that this characterization overstated the witness' actual testimony regarding this important factor. Though Dozer did testify as to various transactions in which John Gambone, Jr. received cash payments, N.T. 10/30/00 at 748-52, she then testified only that the money paid for extras "goes to the office, to Gambone Brothers." *Id.* at 71.

it might be an FBI agent. N.T. 11/2/00 at 140-41. Gambone told Gaasche that he and each of his brothers had received $50,000 and that he wanted the money to go on the books. *Id.* He said that three individuals – John Gambone, Jr., Lydia Lupo, and Anne Dozer – had received commissions of $6,000, and to make sure these monies also got on the books. N.T. 11/2/00 at 141-42. Even assuming, however, that this testimony supported the inference that the $50,000 distributions referred to by John Gambone, Sr. came from the same cash testified to by Anne Dozer, Dok Yi, and Barry Vesotsky, the evidence was insufficient to support an inference that John Gambone, Sr. actually received his distribution in 1994 or at or around the same time as Anne Dozer. Gaasche dated his conversation with John Gambone, Sr. to the late summer of 1995. N.T. 11/2/00 at 140-41. At that time, Gambone also told Gaasche that he was also going to notify George Falconero[13] to make sure the monies got on the books by the end of the year. N.T. 11/2/00 at 141. Gaasche booked the cash in December of 1995 after the execution of the federal search warrant, but did not include any information about who delivered the cash or to which properties the monies corresponded. N.T. 11/2/00 at 148-49, 153-55. The Court concludes that while the testimony was sufficient to support the conclusion that distributions were eventually made, nothing in the testimony established that the distribution was made in 1994, as opposed to 1995. This

[13] George Falconero is a partner with Maillie Falconiero, the accounting firm handling the accounts for Gambone Brothers Organization, Inc. and all its companies. N.T. 11/6/00 at 19-21.

failure of the evidence to pinpoint the timing of the distribution means that the evidence was insufficient for any rational jury to conclude, beyond a reasonable doubt, that John Gambone, Sr. received cash that should have been reported on his 1994 return. Having determined that the evidence was insufficient, the Court grants John Gambone, Sr.'s motion for judgment of acquittal on Count 2.[14]

2. Anthony Gambone (Count 3)

In Count 3, Defendant Anthony Gambone was convicted of filing a false tax return for the year 1994 under penalty of perjury. Specifically, the Indictment charged that Anthony Gambone failed to report approximately $52,780 in unreported income. He moves for judgment of acquittal on the basis that the evidence was insufficient to establish that he received the money in the calendar year 1994.

The Court has already determined that the evidence was insufficient for any rational jury to find beyond a reasonable doubt that John Gambone, Sr. received the cash in 1994. The evidence to support that Anthony Gambone received his distribution in 1994 was even more attenuated. The Government first relies on the testimony

[14] The Court observes that the deficiency in the evidence with respect to the § 7206(1) violation does not affect this Court's conclusion that the evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that there was a cash skimming sub-scheme as charged in prong 1 of the conspiracy count. The key deficiency in the proof for Count 2 was proof of the timing of the distribution of cash that allegedly should have been reported on the 1994 return. Proof of this particular fact, however, was not essential to proving the prong 1 sub-scheme in the conspiracy count.

of Thomas Gaasche, who testified that in the late summer of 1995, John Gambone, Sr. told him that he and each of his brothers received about $50,000 in cash. N.T. 11/2/00 at 140-41. As already discussed above, however, this testimony was insufficient to establish that the distributions were made to the brothers during 1994. The Government next relies on the testimony of Robert Sylvester that on one particular occasion, he saw John Gambone, Sr. with a sum of cash, and Gambone remarked that he had to "split it [cash] with [my] brothers." N.T. 11/1/00 at 157 (Sylvester). However, this undated conversation, while perhaps sufficient to establish that John Gambone, Sr. split cash distributions with his brothers, was wholly insufficient to support an inference that John Gambone, Sr. gave the $50,000 to Anthony Gambone during 1994, even if John Gambone, Sr. himself received the cash in 1994. Moreover, since the Court has concluded that the evidence was insufficient for any rational jury to conclude beyond a reasonable doubt that John Gambone, Sr. received the cash during 1994, it follows that the evidence must also have been insufficient to establish that Anthony Gambone received the cash during 1994, insofar as Anthony Gambone's receipt of cash depended on his brother's initial receipt of cash from the business. Accordingly, the Court grants judgment of acquittal as to Anthony Gambone on Count 3.

3. William Murdoch (Count 4)

In Count 4, William Murdoch was convicted of filing a false tax return for the year 1993 under penalty of perjury. Specifically, the Indictment charged that Murdoch failed to report approximately $14,956.80 in unreported income. Murdoch moves for judgment of acquittal on Count 4. He

contends that the evidence at trial was insufficient to establish that he should have reported the expense reimbursements, and that he willfully violated a known duty to report them. The Court grants acquittal on this count.

During 1993, Murdoch received $257 per week as a vehicle allowance expense. However, there was no evidence that he did not have legitimate vehicle expenses. *See, e.g.*, N.T. 11/3/00 at 86, 131-32 (Cindy Murray). More critically, even if one could infer, from the testimony that he worked in the office, that Murdoch did not have vehicle expenses or at least that he did not have $15,000 in such expenses, there was no evidence establishing that he knew he had to report the expense income.[15] Though Murdoch participated extensively in the straight-time overtime prong of the conspiracy, the evidence does not similarly establish knowledge and intent with respect to "bogus" expense income. This lack of evidence of knowledge and intent extends to his own payments of expense income. Accordingly, the Court concludes that the evidence at trial

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[15] The Court observes that the reporting of expense reimbursement payments by an employee to the Internal Revenue Service is governed by sophisticated provisions under the tax code, with differing provisions governing the reporting of income under accountable and non-accountable plans. Because the § 7206(1) violation requires willfulness, it is not sufficient that the Government establish that the income was reported improperly. The Government has the burden to establish that the particular defendant knew of the particular reporting requirements relating to the income, and willfully failed to report it on a document signed under penalty of perjury. Although the Government presented some evidence at trial demonstrating that some employees received expense monies without having legitimate expenses, the Government failed to establish that William Murdoch knew of the reporting requirements, and that he, therefore, knew that his return was false when he signed and filed it.

was insufficient for any rational trier of fact to find, beyond a reasonable doubt, that Murdoch willfully subscribed the return falsely with the specific intent to violate the law. The Court therefore grants judgment of acquittal as to Count 4.

4. Robert Carl Meixner (Count 6)

In Count 6, Robert Carl Meixner was convicted of filing a false tax return for the year 1993 under penalty of perjury. Specifically, the Indictment charged that Meixner failed to report approximately $31,935.33. He moves for judgment of acquittal on Count 6, arguing that the evidence established only that his return did not report the "separate check" overtime and expense reimbursement payments he received during the year, but that the evidence failed to establish that this was reportable income. He further argues that the evidence failed to establish willfulness. The Court disagrees and therefore denies the motion.

At a minimum, the evidence established that Meixner received unreported overtime wages during 1993, and this income would have been reportable.[16] The following evidence was presented at trial. The annual 1099 lists were created on the computer based on monies that were paid out of the accounts. N.T. 10/27/00 at 98 (Tamaki). The 1099s for 1993 were prepared by Julia Tamaki at the

[16] The Court agrees, however, with respect to expense reimbursements, that there was no evidence at trial to establish that Meixner knew of his duty to report the expense monies, and that he therefore willfully violated that duty by filing a false return.

direction of Tom Gaasche, who gave her the list. N.T. 10/27/00 at 102. Statements made by Meixner and testified to by other witnesses established that he knew that he was being paid improperly. *See* N.T. 10/31/00 at 98-99 ("[I]f we ever wanted to do anything, if we ever quit or did anything, all we would have to do is call the IRS and tell them the way we were paid"); N.T. 11/3/00 at 226-27 ("If anything ever happened, Gambone would have to pay you half time, and that would – and everything would be a wash.") The Court concludes that the evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that Meixner failed to report income that should have been included on his tax return, and moreover that he knew of this obligation and willfully violated it. Meixner's motion for judgment of acquittal as to Count 6 is therefore denied.

C. Aiding and Assisting (Counts 7-42, 44-56, 58-67)[17]

Defendants John Gambone, Sr. and Anthony Gambone also seek judgment of acquittal on the aiding and assisting counts pursuant to 26 U.S.C. § 7206(2).[18] Defendants

[17] Defendants were also charged, but were acquitted, on Counts 43 and 57. Accordingly, the Court will consider all references in the motions and briefs to Counts 7-67 not to include Counts 43 and 57.

[18] Section 7206(2) provides:

> (2) Aid or assistance. – [Any person who] [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or

(Continued on following page)

contend that the convictions are based solely on evidence that the Defendants provided false W-2 forms to the employees. Citing the decision of the Court of Appeals for the Sixth Circuit in *United States v. Hughes,* 899 F.2d 1495 (6th Cir. 1990), Defendants contend that 26 U.S.C. § 7204 provides the sole remedy for the violation of providing false W-2 forms to employees, and that the convictions under 26 U.S.C. § 7206(2) therefore cannot be based on the false W-2s.

The provision by an employer of a false W-2 form falls under § 7204 of the Internal Revenue Code. That section provides:

> In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

26 U.S.C. § 7204 (1994).

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fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(2) (1994).

In *Hughes,* the defendant was convicted of several tax code violations, including the aiding and assisting in the filing of a false document with the IRS in violation of 26 U.S.C. § 7206(2), in connection with the provision of a false W-2 for an employee.[19] Seizing upon the "in lieu of" language of § 7204, Defendant moved for acquittal before the district court on the § 7206(2) conviction, on the ground that such violations could only be prosecuted under § 7204. With respect to the false W-3 conviction, the district court concluded that "the violation of § 7204 is a lesser included violation of § 7206, and so, consonant, with defendant's request . . . [the court] finds him guilty of violating the misdemeanor provisions of § 7204."[20] *United States v. Hughes,* Crim. Act. No. CR86-98, 1987 U.S. Dist. LEXIS 11708, at *12 (N.D. Ohio Nov. 13, 1987).

The court, however, upheld the § 7206(2) conviction for the provision of false W-2s. The court concluded:

> [T]he simple fact of providing, or helping to provide, an individual with a fraudulent W-2 is not punishable under § 7206(2) because of § 7204's "in lieu of" provisions. *However, the evidence at trial showed that Hughes went further than merely providing Griffith with the false W-2's. Based on the evidence presented, the jury could have found beyond a reasonable doubt that*

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[19] Defendant was also convicted of one count of aiding and assisting in violation of § 7206(2) for filing of a false W-3. The court reduced the felony conviction to a misdemeanor conviction under § 7204. *Hughes,* 1987 U.S. Dist. LEXIS 11708, at * 12.

[20] The statute of limitations applicable to prosecution under § 7204 is three years. 26 U.S.C. § 6531 (1994).

> *Hughes additionally counseled Griffith to understate her income on her income tax return, by reporting as income only that amount shown on the W-2 and not the additional income which she received as "expenses."* Defendant himself cites three cases in which persons were convicted for violating § 7206(2) by assisting and counseling individuals to file false income tax returns, part of which assistance was to provide the individuals with false W-2 forms. [citations omitted] In a sense, the false W-2 form is irrelevant. As long as there are other actions violative of § 7206, the fact that the defendant may also have provided an individual with a false W-2 does not prevent a § 7206 conviction.

Hughes, 1987 U.S. Dist. LEXIS 11708, at *12-13 (emphasis added).

On appeal, the Sixth Circuit reversed, though not with respect to the district court's interpretation of the law. Rather, the Sixth Circuit disagreed with the district court's interpretation of the evidence, concluding that a "fair reading of the evidence would not permit the jury to conclude that defendant took any action with respect to the filing of Griffith's tax return other than causing the CWA to furnish her with a false W-2 form. In particular, Griffith expressly denied that defendant gave her any advice concerning the filing of her tax return." *Hughes,* 899 F.2d at 1501.

Defendants contend that in this case, the evidence at trial established only that the Gambones provided false W-2s to its employees, and that the § 7206(2) convictions should therefore be set-aside because the evidence only proved violations of § 7204. If Defendants are correct about their characterization of the evidence, then *Hughes*

and the "in lieu of" language of § 7204 stand for the proposition that Defendants can be convicted of nothing more than violations of § 7204.

This case presents an issue of first impression in this Circuit. Defendants have not cited, and the Court has not found, any Third Circuit law dealing with the meaning of the "in lieu of" language of § 7204, and more specifically, with the intersection of § 7204 with § 7206(2). The Court does find the reasoning of the *Hughes* court to be persuasive, however, insofar as the presentation of evidence solely making out a § 7204 violation cannot, by itself, be sufficient to establish a § 7206(2) violation. To hold as such would be to eviscerate the meaning of the "in lieu of" language.

However, conduct which involves, but is not exclusively limited to, the provision of false W-2s can be sufficient for a § 7206(2) violation. Thus, the mere fact that the provision of false W-2s was a part of the case does not mean that a § 7206(2) violation is not possible.[21] Courts have upheld § 7206(2) convictions where the schemes involved the provision of false W-2s.[22] *See United States v. MacKenzie,* 777 F.2d 811, 813 (2d Cir. 1985) (involving straight time for overtime paid off the books by separate

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[21] The Court does not understand Defendants to be making this precise argument. Rather, the Court understands Defendants to be contending that in determining whether there is a § 7206(2) violation, the Court must disregard entirely the existence of the W-2.

[22] Defendants claim that these cases are not applicable because those courts did not address the "in lieu of" provisions of § 7204. This Court agrees that these cases do not entirely resolve the issue, but nevertheless finds in them support for the notion that a scheme including false W-2s may be considered under § 7206(2).

check with separate records and no withholdings); *United States v. Isaksson,* 744 F.2d 574, 575 (7th Cir. 1984) (paying employees partial wages from separate accounts with no withholding to allow employees to underreport income). The Court recognizes that neither the *MacKenzie* nor the *Isaksson* court addressed the "in lieu of" aspect of § 7204.[23] However, neither did the *Hughes* court's decision foreclose the use of § 7206(2) when additional conduct was involved. This Court disagrees, therefore, with Defendants' assertion that *Hughes* and *MacKenzie* and *Isaksson* are in conflict, particularly as the latter two cases both involved conduct that exceeded the mere provision of false W-2s to employees. *See MacKenzie,* 777 F.2d at 813; *Isaksson,* 744 F.2d at 575.

The Court also disagrees with Defendants' overly broad reading of *Hughes.* Defendants argue that the steps predicate to the provision of a false W-2 are not evidence which can be considered in proving a § 7206(2) case. They further argue that the company's payment scheme – the use of separate checks, for example – constitute steps predicate to the filing of the false W-2s. The Court believes Defendants' interpretation to go well beyond the actual decision articulated by the *Hughes* court. Carrying Defendants' argument to its logical conclusion, it would be impossible to have a § 7206(2) charge in which false W-2s were issued, because just about any actions taken in setting up the false payment scheme would qualify as

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[23] Of course, this Court also cannot speculate as to how the Second or Seventh Circuits would have ruled if faced squarely with the question of whether a § 7204 violation precluded a § 7206(2) violation in those cases.

predicates to the filing of the W-2s. Even if Defendants are correct that the steps predicate to the filing of the false W-2s must be excluded from consideration, this Court finds it untenable to exclude from consideration all the evidence relating to how the books were kept, how the accounts were managed, and how the checks were written. The district court's decision in *Hughes* fails to support Defendants' contentions, particularly since the district court initially upheld the W-2 conviction, and the appeal's court overturned the conviction based on an erroneous interpretation of the evidence, and not an erroneous articulation of the law.

Under this framework and understanding of the requirements of § 7206(2) in light of *Hughes* and § 7204, the Court next examines the sufficiency of the evidence. At trial, the following evidence was presented. The system provided separate checks (and therefore separate accounting) for employees' regular 40-hours and for their overtime. Individual employees testified that they were told the overtime was paid "off the books" or "under the table." N.T. 11/6/00 at 177 (Stephen King); N.T. 10/26/00 at 85-89 (Joseph Kuniewicz); N.T. 11/6/00 at 239-41 (James Leonard). John Zangari testified that when he hired employees, he explained the overtime system to the new employees that "their overtime check was straight cash and it wouldn't be claimed." N.T. 10/31/00 at 39-40. Moreover, employees testified regarding communications to the effect that they did not have to report the income to the IRS. N.T. 10/26/00 at 18-19 (Thaddeus Wienczek); N.T. 11/6/00 at 239-41 (James Leonard). Testimony was also presented indicating that the fraudulent payroll system was created by the Defendants, and was understood and intended by them to make it possible for employees not to

report the income. *See* N.T. 10/26/00 at 248-54, 256, 261 (Ruser); N.T. 10/31/00 at 30-31, 48-49, 51 (Zangari); N.T. 11/2/00 at 167-68, 262-64 (Gaasche); N.T. 11/3/00 at 70-73 (Murray); N.T. 11/3/00 at 138-39 (James Schmidt).

The Court concludes that the evidence, particularly that provided by the dozens of employees who testified at trial, was sufficient for any rational jury to find beyond a reasonable doubt that Defendants aided and assisted the employees in filing false returns, beyond the mere provision of false W-2s. The Court concludes that, even excluding consideration of the W-2s themselves, the evidence was sufficient to support the convictions. The evidence was sufficient for the jury to find that the Defendants created the particular payment scheme (and persisted with that scheme even after they knew it was improper) and that they communicated, either directly or through their supervisory employees, that the funds paid without withholding would not be reported. There was evidence of specific instances in which the Defendants indicated that payment would be made with the intention of having that payment not be reported to the IRS. This evidence goes well beyond the mere provision of false W-2s, and satisfies the "in lieu of" concerns raised by *Hughes*.

Defendants also contend that the evidence at trial was insufficient to establish the offenses because it did not establish that the Defendants specifically knew how much each particular individual employee was being paid and that the W-2s were false. The Court recognizes that the evidence in the case failed to establish such specificity of knowledge. However, the Court also observes that as the owners and managers of the company and the creators of the payment system, the Defendants had sufficient knowledge and intent to aid and assist the employees in filing

false returns, even if they might not have known what particular amounts affected what particular employees. Furthermore, the fact that the Defendants did not have actual communications with every one of the employees listed in the individual counts does not mean that they did not aid and assist those employees in filing false returns with the IRS. The evidence presented at trial was sufficient to establish the Defendants' willfulness and intent with respect to the individual employees. Therefore, the Court determines that the evidence presented at trial was sufficient to establish the § 7206 violations. Accordingly, the Court denies the motion for judgment of acquittal as to Counts 7-42, 44-56, and 58-67.

IV. Motions for New Trial

In the alternative, Defendants seek a new trial. Defendants raise four grounds for new trial. The Court will consider each of these grounds in turn.

A. Erroneous jury instructions for Counts 7-67

Defendants first assert that the Court's jury charge on Counts 7-67 was "fundamentally erroneous in that it instructed the jury to presume aiding and assisting under certain facts that were insufficient as a matter of law to support that element."[24] (Doc. No. 210 at 5.) The Court instructed the jury as follows:

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[24] Defendants' request for a new trial on this ground is an alternative to its motion for judgment of acquittal on counts 7-67.

> I instruct you as a matter of law that if you find beyond a reasonable doubt that a defendant willfully furnished, prepared or caused to be prepared false and fraudulent documents which the defendant knew would be relied on in the preparation of income tax returns and would result in returns which were materially false for any of the reasons stated in Count 7 through 67 in the indictment, then the Government has met its burden of proof in this element of [the offense].

N.T. 11/15/00 at 70. Defendants contend that this instruction constituted plain error, because the instruction suggested to the jury that it could convict on a § 7206(2) charge based only on the false W-2 evidence.[25] Defendants claim that in this case, because the fraudulent document involved was a W-2, the ordinarily standard instruction was erroneous. Defendants' objection is based on the relationship between § 7204 and § 7206(2), which is discussed at length above. As the Court observed throughout the trial, in a § 7206(2) case involving false W-2s, there

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[25] In initially raising and briefing this issue, Defendants cited *United States v. Goldberg*, 105 F.3d 770 (1st Cir. 1997) for the proposition that "foreseeable tax consequence" is not enough for conviction. Defendants asserted that the instruction was erroneous because "[t]he line between knowing that a W-2 will result in a false return and simply recognizing a false return to be a 'foreseeable tax consequence' is just too fine for any jury to draw."

The Court notes that this section of *Goldberg* pertained to the § 371 conspiracy charge in that case, and was aimed at distinguishing between a Klein defraud conspiracy and a tax evasion charge under the Internal Revenue Code. The Court does not agree that the instruction referred to here, which was very clearly given in the context of the § 7206(2) charges only, presents that kind of error. To the extent Defendants rely on this argument in establishing plain error, their reliance is misplaced.

needs to be additional action aside from the false W-2s to establish a violation of § 7206(2).

In the absence of an objection, the Court examines the charge for plain error.[26] *United States v. Santos,* 932 F.2d 244, 251 (3d Cir. 1991); *United States v. Benedetto,* 558 F.2d 171, 176 (3d Cir. 1977). Plain errors are those that "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States v. Young,* 470 U.S. 1, 16 (1985). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977). The Court must review the instructions not "in artificial isolation, but . . . in the context of the overall charge." *United States v. Park,* 421 U.S. 658, 674 (1975) (quotations omitted).

The Court concludes that, in context, the jury instruction at issue was not plainly erroneous. That portion of the instructions very clearly discussed only a portion of the proof necessary to establish a § 7206(2) charge. The Court very explicitly and repeatedly instructed the jury that in order to establish the charge, the Government needed to establish that the Defendants did more than simply provide a false W-2. In the context of the entire charge on the substantive law for the § 7206(2) charge, the instruction was not erroneous. Prior to that section of the charge, the Court instructed the jury as follows:

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[26] Defendants acknowledge that they did not object to this part of the charge. John Gambone, Sr.'s Reply Memo. at 12; *see* N.T. 11/17/00 at 82-84.

Okay. Now let's focus on aiding and abetting. What is it, what can it be? Where should your focus be with respect to whether there has been aiding and abetting?

First let me state that it is not enough, it is not enough for the Government to establish only that the individual taxpayers listed in Count[s] 7 through 67 received a Form W-2 that did not include all of their income. That's not enough to make the charge. If that's all there is, it's not enough to make the charge.

In order for the Government to establish that Anthony Gambone or John Gambone aided or abetted those individuals in filing a false return, you must find first that the return they filed was indeed false. Secondly, that the individual taxpayer in fact had income from Gambone Brothers that was not reported on this tax return; thirdly that the failure to report was the cause of the unlawful assistance of the defendant; and fourthly, that besides giving the taxpayer an incorrect Form W-2, Anthony or John Gambone did something else to aid that particular taxpayer in filing false return, [sic] besides [providing] an incorrect Form W-2 or transmitting an incorrect Form W-2.

And as to each taxpayer, members of the jury, you must affirmatively decide that the Government has proven beyond a reasonable doubt that the defendant did something to aid and assist that taxpayer besides simply and only providing an incorrect W-2 form. And you have heard all of the evidence with respect to everything that was going on. You don't have to determine what was going on, and then determine whether there was aiding and assisting under the definition as I've just given it to you.

N.T. 11/15/00 at 68-69. The Court concludes that the instructions as a whole made clear to the jury that in order to convict on the aiding and assisting counts, the jury had to find, beyond a reasonable doubt, that the Defendants did more than simply provide false W-2 forms to its employees. The instructions were therefore not clearly erroneous, and Defendants are not entitled to a new trial on this ground.

B. Prosecutorial error in closing statement

Defendants next challenge the following statement made in closing rebuttal by the Prosecutor. She said:

> And to think it's not just – Mr. Bergstrom [defense counsel] talks about two percent of $600,000 – let's think about what else it is. It's all the money over all those other years. And again, they want to hide behind the fact that there's not a paper trail of cash. And they want to point their finger at Mr. Sylvester and they want to bring up that whole thing about the bonds. Well, you know, ladies and gentlemen, Judge Padova told you before Ms. Winters' opening that openings were about what the Government expected the evidence to show. *And you saw that throughout this trial, various objections were made and Judge Padova would rule on them as he saw first and you saw that evidence was excluded. So, if there's things we've said we were*

going to prove that we didn't, don't hold it against us. You heard the objections they made.[27]

N.T. 11/14/00 at 172-73.

In deciding whether the prosecution has improperly commented at trial, the court should look to the overall context of the statements in the trial record. *United States v. Young,* 470 U.S. 1, 11 (1985). Improper prosecutorial comments may lead the jury to infer that the prosecutor knows undisclosed facts which she could not present to the jury. *See United States v. Walker,* 155 F.3d 180, 186 (3d Cir. 1998). If the Court concludes that a comment was improper, the Court must then apply harmless error analysis. *United States v. Zehrbach,* 47 F.3d 1252, 1265 (3d Cir. 1995). The standard applied by the court depends on whether the error was of constitutional proportions. *Id.* at 1265. If the error is constitutional, then the conviction can be upheld only if the error is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967). If the error does not involve a violation of a constitutional right, the conviction can be upheld so long as there is a "high probability" that the error did not contribute to the conviction. *United States v. Jannotti,* 729 F.2d 213, 219-20 (3d Cir. 1984).

The Government's comments came in rebuttal, and were offered in response to the following observation by Defense counsel:[28]

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[27] Counsel for Anthony Gambone objected. N.T. 11/14/00 at 173.

[28] The Government contends that its comment was an attempt to "neutralize" the effect of this statement. Invited responses that are reasonable responses to improper attacks by defense counsel are

(Continued on following page)

> So what he tries to tell you is some tales about savings bonds. And I'm going to tell you this because part of me says stay away from it, Bergstrom, but part of me says you've got to know, because you heard it in the Government's opening argument. They came in front of you and argued to you, some three and a half weeks ago, that there's a million dollars in savings bonds. Well, guess what? There isn't a million dollars in bonds. They didn't show you a million dollars in bonds at all. They showed you some bonds that were purchased between June of '94 and July of 1995. My recollection tells me those bonds totalled about $65,000.

N.T. 11/14/00 at 151-52.

Defendants contend that the prosecutor's comment "made plain to the jury that the prosecution possessed all sorts of other evidence which it was prevented from introducing by the defendants' objections." Reply Mem. of John Gambone, Sr. at 21. However, the Prosecutor's comment did not ask the jury to rely upon outside evidence to prove an element of the crime. As she explained during oral argument, "What we were saying was openings, as you told the jury before they began, are

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generally not reversible error. *Young*, 470 U.S. at 12-13. The Court disagrees with the Government that its statement was an "invited response" for the simple reason that there was nothing improper about defense counsel's statement. Defense counsel's purpose was to point out the gap between what the Government said it would prove, and what the evidence at trial actually proved. Though it is true that the Government is not required to prove each and every allegation made in an indictment, pointing out such a deficiency is proper argument. Therefore, the doctrine of invited error is inapplicable in this case. *See United States v. Molina-Guevara*, 96 F.3d 698, 704 (3d Cir. 1996).

predictions of what the evidence is going to show. And our prediction was wrong." Trans. 5/15/01 at 29.

Even assuming that the comment was construed by the jury to mean that the government had evidence that the jury should rely upon, the comment clearly was not so broad in context. The statement was made in the context of a specific discussion about the amount of bonds, and further that there were large amounts of cash. The prosecutor first directed the jury's attention to "all the money over those years." Then following her statement in response to Defense counsel, she continued to discuss the existence of cash, noting that:

> In addition, let's just talk – it's not just the money that they didn't report on their own taxes. Think about the literally millions of dollars in unreported income . . . . You go back and look at those performance bonus schedules and see what it is on $600,000. It's a lot of money.

N.T. 11/14/00 at 173. Ms. Hayes' comments in rebuttal lacked any specific reference to evidence, and, moreover, did not go so far as to ask the jury to rely upon it in finding particular elements of the crimes charged. They were thus different in character from improper comments in the cases cited by Defendants. *See, e.g., United States v. Wilson,* 135 F.3d 291, 298 (4th Cir. 1998) (going outside of evidence and asserting several times that defendant had murdered a man when such fact had not been proved); *United States ex rel. Shaw v. De Robertis,* 755 F.2d 1279, 1281 (7th Cir. 1985) (informing the jury that, "You're not going to get those police reports. They're hearsay evidence. You can't have them. If you had them, you would see the truth."); *United States v. Vaglica,* 720 F.2d 388, 393-94 (5th Cir. 1983) ("The reason we didn't bring any evidence in one

way or the other [regarding particular aspect of defendant's intent] is because the Federal Rules of Criminal Evidence prohibit us from bringing in any witness on that particular item.").

Even assuming, however, that the prosecutor's comment was improper, the Court concludes that in the context of the entire proceeding, the error involved was harmless beyond a reasonable doubt.[29] In order to overturn a conviction or sentence for improper prosecutorial comments during a summation, the defendant must demonstrate prejudice sufficient to show the comments deprived defendant of a fair trial or violated the reliability of the sentencing process. *Darden v. Wainwright,* 477 U.S. 168, 180-81 (1986) (upholding death sentence despite the prosecutor's improper comments because of lack of prejudice). The Court looks to three factors to determine whether there is prejudice: the scope of the improper comments in the overall context of the trial; the effect of any curative instructions given; and the strength of the evidence against the defendant. *United States v. Mastrangelo,* 172 F.3d 288, 297 (3d Cir. 1999). The court views the statements, in the context of the entire proceeding, to determine if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller,* 483 U.S. 756, 765 (1987) (citing *Donnelly v.*

[29] In this case, Defendants assert that the error was constitutional, because it infringed upon Defendants' Sixth Amendment right to confront witnesses. The Court will apply the more stringent "reasonable doubt" standard of *Chapman,* but notes that under either standard, its finding of harmless error would be the same.

DeChristoforo, 416 U.S. 637, 643 (1974) (upholding conviction despite improper remarks by the prosecutor as to the defendant's motivation to stand trial rather than plead)). Absent such a showing of unfairness and prejudice, prosecutorial misconduct alone does not require invalidation of a conviction or sentence. *See Smith v. Phillips,* 455 U.S. 209, 220 (1982).

In this case, the comments were an isolated reference made once during the course of a four-week trial, thus distinguishing the comments from cases involving repeated improper remarks.[30] *See, e.g., Mastrangelo,* 172 F.3d at 296-98 (involving repeated misstatement and mischaracterization of stipulation relating to key element of offense, where Court's curative instruction also misstated the stipulation); *United States v. Murrah,* 888 F.2d 24, 28 (5th Cir. 1989) (holding that repeated and pervasive remarks evaluating evidence, referring to witness who did not testify, and accusing opposing counsel of misconduct were designed to divert jury's attention from the charged offenses). In fact, the prosecution ended its rebuttal with the following statement:

> It is not an easy thing to do to say that someone is guilty. But if you find that the evidence proves beyond a reasonable doubt, that is what you have sworn to do. And as hard as it is, that's what you

[30] Additionally, the Court instructed the jury, both in preliminary remarks prior to the start of the trial, and prior to deliberations at the conclusion of the trial, that the evidence in the case was limited to that presented in Court, and that argument by the attorneys, including opening and closing statements, questions, and objections, were not evidence. These comments were far more extensive than the brief ones made by the prosecution.

> have to do. And all the Government wants you to do in this case. We don't want you to look on supposition. We don't want you to look on assumptions. We want you to look at the evidence that we presented. The documents and the witness testimony.

N.T. 11/14/00 at 185.

Moreover, the comments related to one relatively minor aspect of one portion of the conspiracy scheme – the prong one cash skimming scheme.[31] The comment related to a discussion of the evidence of the proof of the purchase of bond amounts. At trial, the only direct evidence of these bond purchases related to a relatively short period, during which some $65,000 or so in bonds were purchased. However, Robert Sylvester, a government witness, testified to the practice of purchasing bonds, and to witnessing, on numerous occasions, John Gambone, Sr. handing envelopes of cash to his wife with instructions to purchase bonds. N.T. 11/1/00 at 156, 162. On one occasion, John Gambone asked Robert Sylvester to accompany Mrs. Gambone to the bank with $70,000 for the purpose of purchasing savings bonds. N.T. 11/1/00 at 163-64. Because the jury had more than sufficient evidence presented at trial upon which to base its prong one conviction, the error is harmless. *See Zehrbach,* 47 F.3d at 1267 ("[T]he extensive evidence of [defendants'] intent to defraud supports

[31] In their briefs and at oral argument, counsel for all the Defendants contended that the comments were an open invitation to the jury to scour the Indictment for facts that were not proven at trial, and to fill in the gaps. Given the context of the comments in the entire rebuttal, the Court finds this interpretation improbable.

our conclusion that the prosecutor's remarks would not have prejudiced the jury's deliberations."). The case is thus distinguished from those in which the prosecutor's improper comment touched upon an issue that would have made a difference in the outcome of the case. *See, e.g., Mastrangelo,* 172 F.3d at 297 ("The prosecution sought to have the jury infer that [defendant] was the 'cook,' that is, the individual who actually turned the ingredients into methamphetamine, but it had no evidence, direct or indirect, of that fact."); *United States v. Molina-Guevara,* 96 F.3d 698, 705 (3d Cir. 1996) (finding that prosecutor's repeated improper statements regarding credibility of two government agents was not harmless error where resolution of crucial issue rested on whether jury believed the defendant or the agents).

Furthermore, construed in its broadest sense, the comments do not go beyond prong one of the conspiracy, in which Defendants John Gambone, Sr. and Anthony Gambone were charged. In this case, the jury convicted Defendants on all three prongs of the conspiracy.[32] Even assuming that the prong one conviction would be properly vacated, the jury need only have convicted Defendants on one other prong of the conspiracy. In this case, the jury's convictions based on prongs two and three of the conspiracy would negate the need for a conviction on prong one as well.

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[32] The convictions of Defendants Murdoch and Meixner on the prong two conspiracy, as well as the substantive convictions of Defendants John and Anthony Gambone on the aiding and assisting counts, demonstrate that the jury concluded that prong two and prong three of the conspiracy existed.

C. Error for Admitting Portions of Tape Recording

Defendant Anthony Gambone also moves for a new trial on the basis that the trial court erred by admitting portions of the March 11, 1998 tape recorded conversation between Defendant Anthony Gambone and Defendant John Zangari, a former Gambone Brothers employee and a cooperating government witness. Trial counsel for Anthony Gambone moved in limine to exclude the tape recording. Doc. No. 93. The Court denied the motion to exclude the entire tape, pursuant to Federal Rule of Evidence 801(d)(2)(A). N.T. 10/25/00 at 8, 15; Doc. No. 177. The Court excluded certain portions of the tape that referred to other bad acts or issues relating to legal counsel. N.T. 10/30/00 at 89-91, 106-11; N.T. 10/31/00 at 4-15. Co-Defendants John Gambone, Sr., William Murdoch, and Robert Carl Meixner also moved to preclude the tape against them. Doc. No. 97. The Court granted the Motion. Doc. No. 177. After the tape was played at trial, trial counsel moved to strike the tape and for mistrial. N.T. 10/31/00 at 121. The Court denied both motions. N.T. 10/31/00 at 123-24.

Defendant Anthony Gambone moves for a new trial on the basis that the admission of the tape into evidence was reversible error because: (1) the tape does not constitute admissions, and (2) even if so, it should have been excluded under Rule 403. The Court disagrees on both grounds.

Defendant first contends that the admission of the audio tape was erroneous because the statements were not admissions. The Court disagrees, and concludes that the evidence was properly admitted pursuant to Federal Rule of Evidence 801(d)(2)(A). The portions of the tape that

were admitted constituted admissions by Anthony Gambone of knowledge and participation in the fraudulent payment scheme, and included apparent attempts to cover up those activities by encouraging Zangari not to talk. For example:

> Anthony Gambone: They'll put us all in jail. Now who told you that? Look here's, here's what you have to do, just use your head. *Number one . . . it's all over the money that we paid without no taxes.*
>
> John Zangari: What, what am I supposed to do?
>
> Anthony Gambone: Wait a minute, slow down. You get the lawyers, we'll, we'll, we'll, just, just don't do no talking to 'em_that's all. You don't talk to them. Understand? . . .

Gov't Ex. 66 ("Audio Tape Trans.") at 2 (emphasis added).

* * *

> Anthony Gambone: Wait a minute, would you just shut the [blank] up a minute. You think I'm trying to hurt you. I can't hurt you. I can't hurt you for Christsake. What's the matter with you?
>
> John Zangari: You can't you already did by the way you paid me. I'm hurt. How, how do I get around that Tony? How do I get around the taxes? They said I'm going to have to pay on all the money that I was paid!
>
> Anthony Gambone: Slow down, slow the [blank] down will you. Jesus Christ you're acting like you're the only guy that got the, got the, the letter.
>
> John Zangari: They scared me to death. I just got done talkin' to them!

Anthony Gambone: Slow down. Well what are you going to do? You never got, you never got involved in anything like this?

John Zangari: [Blank] no!

Anthony Gambone: John, it all boils down to this, there's no [blank] two ways about it. You turn around, we'll have, we'll get you a good attorney.

Audio Tape Trans. at 5.

* * *

John Zangari: I'm going, I have, I'm going to my own attorney as soon as I leave here.

Anthony Gambone: Just slow down.

John Zangari: To see what I should do.

Anthony Gambone: *The only thing you shouldn't do is try to hurt me.*

Audio Tape Trans. at 6 (emphasis added).

* * *

Anthony Gambone: Did I ever tell you to go out and do something to deliberately hurt, hurt me or hurt the government?

John Zangari: *Tony when I came to work for you, you paid that way. We had no choice. Remember, um what's his name that one guy? That one laborer, Bobby Eickholt or whatever his name was, came in, he did not want to work this way. You told me to fire him, if he don't want to work and pay the taxes fire him, if he don't want to work the way you pay. I, what, well suppose this guy talks? What am I supposed to say, I never had the conversation with him?*

Anthony Gambone: *Yeah but what I'm saying . . .*

Audio Tape Trans. at 7 (emphasis added).

John Zangari: I'm going to, I uh have a real good friend attorney that's, I did work for him. He's a criminal friend attorney that's, I did work for him. He's a criminal lawyer. I'm going to talk to him today to see what I should do.

Anthony Gambone: If you want to use you head the right way *because whatever you do to try to hurt me or try to hurt youse, you'll hurt yourself too.*

Audio Tape Trans. at 8 (emphasis added).

* * *

John Zangari: *I never got no 1020s or whatever the [blank] they are.*

Anthony Gambone: *No, no that's one of the things we did wrong.*

Audio Tape Trans. at 18 (emphasis added).

* * *

Anthony Gambone: Let me say this, get, that's fine you can have him, but you got to have a good IRS attorney with it. Alright, understand what I'm saying? *If you're going to be on our team, and then, keep it on the team. So you save your ass and save everybody else's ass . . . .*

* * *

Anthony Gambone: Let me tell you something, nobody's going to jail if you use your [blank] head. *If you don't use your head then maybe everybody goes to jail. Now, the only thing I'm saying*

> *to you is all you gotta do is not be a panic and don't talk to nobody, number one.* Don't talk to a [blank] soul, alright, see my attorney, alright.

Audio Tape Trans. at 19 (emphasis added).

* * *

> John Zangari: *Tony when I came to work for you for the taxes, I had no choice, this is the way you paid. This is what it's about.*
>
> Anthony Gambone: *My whole theory was we paid more per hour than the person was worth.*

Audio Tape Trans. at 20 (emphasis added).

> Anthony Gambone: What they're gonna do, they'll say now we'll give you plenty of this you just rat on everybody else and do everything you can do and you got nothing to worry about. They'll, they'll probably do that to you, you know. You don't have to rat on everybody, you don't have to do anything wrong to, to get everything cleaned up.

Audio Tape Trans. at 21.

> Anthony Gambone: Alright. Slow down. Go to work for an hour or so two hours. Running to your attorney, the way you are now, you're not worth five cents, you understand? *You even got to watch what you tell them because they'll go make a deal and act like you're mister hero, because for you to get hurt and me to get hurt, you gain nothing, for me to get hurt, you gain nothing. You understand?*

Audio Tape Trans. at 23 (emphasis added). The Court concludes that the portions of the tape that were admitted

were properly admitted under the Federal Rules of Evidence.

Defendant alternatively suggests that the probative value of the tape is greatly outweighed by prejudice. Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. The Court disagrees. Defendant's admissions on the tape were probative of his knowledge and participation in the conspiracy charged in the indictment. Defendant has failed to demonstrate sufficient prejudice to outweigh the probative value of that evidence. In moving to strike the tape after it was played, trial counsel posited that the tape has "a lot of cursing and swearing, and it just makes things look bad, but there is no substance to it, . . ." N.T. 10/31/00 at 122. The Court concludes that the probative value outweighed this rather minimal danger of prejudice.[33] Therefore, Defendant's motion for a new trial is denied.

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[33] The Court concludes that the case relied on by Defendant, *United States v. Sriyuth*, 98 F.3d 739 (3d Cir. 1996), is inapposite. In *Sriyuth*, which involved charges of kidnapping, the district court admitted evidence of a prior rape of a nine-year old boy under Federal Rule of Evidence 404(b). Because of the facts involved in *Sriyuth*, the danger of prejudice was far more extreme and real. In any case, the Third Circuit upheld the admissibility of the evidence under Rules 404(b) and 403. *Sriyuth*, 98 F.3d at 746.

D. Error for Admitting IRS Forms-1099 as Business Records

Defendant Anthony Gambone moves for a new trial based on erroneous admission of the Forms 1099 as business records. Defendant claims that the forms do not fall under the 803(6) rule as business records. Federal Rule of Evidence 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. Evid. 803(6).

Defendants claims that the testimony of Agents May, Linder, and Patella regarding the 1099s was insufficient to establish that the records fit the business records exception. Specifically, Defendants contend that the documents were not prepared "contemporaneously" and in the "ordinary course of business."

However, Exhibit 86 consisting of a file of forms 1099, was admitted without objection following the testimony of Julia Tamaki, who actually prepared the forms. N.T. 10/27/00 at 103-05, 123. Tamaki prepared the forms at the direction of Thomas Gaasche, the controller of Gambone Brothers. N.T. 11/2/00 at 102. The documents in the

exhibit were clearly created by employees of the Gambone Brothers as part of the negotiated settlement with the Internal Revenue Service and in relation to the regularly conducted business activity of the company. They were created by individuals with knowledge, and were kept in the regular files of the company. The particular employee involved in creating the 1099 forms, in fact, was the same employee who was responsible for creating the 1099s each year. N.T. 10/27/00 at 98-102. The Court concludes that the 1099s were properly admitted as nonhearsay evidence fitting the business records exception. *See* Fed. R. Evid. 803(6). Defendants' Motion for new trial is therefore denied.

V. Conclusion

The Court grants judgment of acquittal for Defendant Robert Carl Meixner on Count 1. The Court also grants judgment of acquittal on Counts 2, 3 and 4. The Court denies all of the other motions for judgment of acquittal and denies all motions for a new trial. An appropriate Order follows.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-4424 and 01-4427

UNITED STATES OF AMERICA

v.

JOHN A. GAMBONE, SR.
a/k/a JACK

John A. Gambone, Sr.,

Appellant in 01-4424

UNITED STATES OF AMERICA

v.

ANTHONY GAMBONE
a/k/a TONY

Anthony Gambone,

Appellant in No. 01-4427

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. Nos. 00-00176-1 and 00-00176-2)
District Judge: Honorable John R. Padova

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, and GREENBERG, Circuit Judges, and WARD,* District Judge

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The petition for rehearing filed by appellants, John A. Gambone, Sr. and Anthony Gambone, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's and Judge Ward's votes are limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton J. Greenberg
Circuit Judge

DATED: FEB 10, 2003

lwc/cc: TAB
KRH
DJG

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* Honorable Robert J. Ward, Judge of the United States District Court for the Southern District of New York, sitting by designation.